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Supreme Court of the United States

OCTOBER TERM, 1962

No. 104

NEW JERSEY, ET AL., APPELLANTS,

vs.

**NEW YORK, SUSQUEHANNA AND WESTERN
RAILROAD COMPANY.**

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

FILED MAY 4, 1963

PROBABLE JURISDICTION NOTED JUNE 25, 1963

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[fol. 1]

[File endorsement omitted]

**IN UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

Civil Action No. 401-61

NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY,
Plaintiff,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION,
STATE OF NEW JERSEY, and BOARD OF PUBLIC UTILITY
COMMISSIONERS OF THE STATE OF NEW JERSEY, Defendants.

COMPLAINT—Filed May 18, 1961

Plaintiff, New York, Susquehanna and Western Railroad Company, alleges and says as follows:

1. Plaintiff is a corporation of the State of New Jersey, having its principal office at 160 Market Street, Paterson 1, New Jersey, and is within the jurisdiction of this Court.
2. This Court has jurisdiction of this action by virtue of the provisions of Title 28, United States Code, Section 1336, and under the procedure established by Chapter 157 of Title 28, United States Code, Sections 2321 to 2325, inclusive, and Section 2284; and the conditions set out by Title 49, Section 17(9), United States Code, have been complied with. To the extent the matter may not be embraced by one or more of the foregoing statutes, this Court has jurisdiction by virtue of Title 5, Section 1009, United States Code (Section 10, Administrative Procedure Act).
3. The venue of this action is in the District of New Jersey by virtue of the provisions of Title 28, United States Code, Section 1398.

4. Plaintiff is a Common Carrier by Railroad subject to the provisions of Part I of the Interstate Commerce Act, Title 49, United States Code, Section 1, et seq.

[fol. 2] 5. This action is brought to review, suspend, enjoin, annul and set aside certain orders of the Interstate Commerce Commission entered by the said Commission in a matter entitled "New York, Susquehanna and Western Railroad Company Discontinuance of Passenger Service Between New York, N.Y. and Butler, N.J.", Finance Docket No. 21417, which said orders are dated January 18, 1961 and May 10, 1961.

6. The order of January 18, 1961 dismissed a notice filed by plaintiff for discontinuance of passenger service between New York, N.Y. and Butler, N.J. pursuant to Section 13a(1) of the Interstate Commerce Act, Title 49, United States Code, Section 13a(1) for lack of jurisdiction. A copy of said order is attached hereto and made a part hereof as Exhibit A.

7. The order of May 10, 1961 denied a Petition filed by plaintiff for reconsideration of the order of January 18, 1961 entered by the Commission by Division 4. A copy of said order is attached hereto and made a part hereof as Exhibit B.

8. On December 30, 1960, plaintiff filed notices of proposed discontinuance of service with the Interstate Commerce Commission pursuant to Section 13a(1) of the Interstate Commerce Act, Title 49 U.S.C. Sec. 13a(1) and Title 49, Code of Federal Regulations Sec. 43.1, et seq. The said notices proposed that plaintiff would discontinue service on its eastbound passenger trains 908, 910 and 916 and on its westbound passenger trains 919, 923 and 929 operating daily except Saturdays, Sundays and Holidays, and on its westbound passenger train 915 operating Good Friday, Election Day, December 23rd and December 30th, effective 12:01 A.M. January 30, 1961. The said notices were mailed to the Governors of New York and New Jersey and were posted in every station, depot or other facility served by the said trains. In conjunction with the filing of the said notices, plaintiff filed a "Statement in Relation

to Proposed Discontinuance of Train Service" with the Commission, required by Title 49, Code of Federal Regulations, Sec. 43.5.

[fol. 3] 9. On January 9, 1961, the State of New Jersey and its Board of Public Utility Commissioners filed a petition with the Commission praying that the Commission enter upon an investigation and moving to dismiss the proceedings without prejudice as improperly brought under Section 13a(1) of the Act. In support of its position that the proceedings should be dismissed as improperly brought under Section 13a(1) of the Act, the State alleged that the trains operated by plaintiff ran on tracks located wholly within the State of New Jersey and that the passengers traveled to New York City by a contract bus. It was further alleged by the State that Commission and Court decisions had held that the use of a bus operation did not make this operation part of a "line of railroad" or an "extension of a line of railroad" as those terms are used in Section 1(18) of the Act. It was then contended that the train operation was wholly intrastate and not within the jurisdiction of the Commission.

10. On January 18, 1961, prior to the time fixed by Rule 23 for plaintiff to file a reply to the petition of the State, the Commission, by Division 4, entered an order (Exhibit A) dismissing the notice filed by plaintiff on December 30, 1960 for lack of jurisdiction. The Commission in its order of January 18, 1961 made a finding that "the trains proposed to be discontinued operate solely within the State of New Jersey" and therefore concluded "the said notice filed December 30, 1960, by the New York, Susquehanna and Western Railroad does not constitute a notice properly filed under the provisions of Section 13a(1) of the Interstate Commerce Act",

11. The said order of the Commission, by Division 4, dated January 18, 1961 (Exhibit A) dismissing the notice of proposed discontinuance of service filed by plaintiff on December 30, 1960 for lack of jurisdiction, and the order of the Commission dated May 10, 1961 (Exhibit B) denying the Petition for reconsideration filed by plaintiff, are improper, erroneous and illegal and should be suspended,

enjoined, and set aside or reversed for the following reasons:

[fol. 4] (a) Plaintiff is a common carrier by railroad with authority, among others, to transport passengers by rail from points in New Jersey to New York City, New York.

(b) It is established as a matter of law that "motor vehicle transportation" of an intraterminal nature is required by Section 202(c) of the Interstate Commerce Act to be regarded as railroad transportation, whether performed by the railroad or, as in the present case, by an agent or contractor of its choosing; Congress is deemed to have been familiar with this requirement when it enacted Section 13a(1) in 1958; wherefore it was error to conclude that plaintiff's train service is only between two points in the same State.

(c) Section 13a(1) of the Act is within Part I and is applicable solely to railroads. The said section provides a method for discontinuing "the operation or service of any train or ferry operating from a point in one State to a point in any other State". The operation and service performed by plaintiff, subject to Part I of the Act, is to transport passengers between points in New Jersey and New York City, in New York.

(d) The argument advanced by the State in its petition for an investigation and motion to dismiss (now denominated by the said Commission to be a "protest") concerning the "line of railroad" operated by plaintiff as defined in Section 1(18) of the Interstate Commerce Act is inapplicable to a proceeding brought under Section 13a(1) for the reason that the phrase "line of railroad" is not found in Section 13a(1); to the extent that these provisions may conflict, the later enactment, Section 13a(1), must prevail.

(e) The legislative history of Section 13a(1), which was Section 5 of the Transportation Act of 1958, 72 Stat. 570, shows that the House Bill, HR. 12832, did contain the phrase "line of railroad" but that this phrase was eliminated by the Conference Committee in the final draft which was enacted into law. 1958 U.S. Code Congressional and Administrative News pp. 3456, 3457, 3487.

[fol. 5] (f) All of the recitals of material and relevant facts set forth in plaintiff's "Statement" filed December 30, 1960 with the Commission constitute evidence and are part of the record herein pursuant to Commission Rule 19; there was no counterpleading thereto filed under the Rules of the Commission, and none of said recitals of facts were specifically denied in any such counterpleading.

(g) Plaintiff was deprived of due process of law in that the Commission entered the said Order of January 18, 1961 without awaiting plaintiff's Reply to the said petition (or protest) on which said order was based, the time for filing such Reply not having expired until January 30, 1961, without hearing or argument, and without affording plaintiff a reasonable time or opportunity to be heard or to present argument on the said petition (or protest) upon which said order was based.

(h) There is nothing contained in Section 13a(1) of the Interstate Commerce Act which imperatively requires that the Commission decide, prior to the effective date set out in the said notice, that a notice filed pursuant to the said section is not within the jurisdiction of the Commission.

(i) Plaintiff was deprived of due process of law in that the Commission failed to comply with its own rules and regulations.

(j) The Commission has issued no special regulations for notices filed under Section 13a(1) of the Interstate Commerce Act, except those found in Title 49, Code of Federal Regulations, Section 43.1 et seq. None of said regulations permit the Commission to render a decision without awaiting the filing of replies to protests or other pleadings.

(k) The Commission did have jurisdiction to conduct a hearing and receive argument on the question of jurisdiction advanced by the State, and it was prejudicial error to have entered the subject Order before plaintiff's time to [fol. 6] reply had expired, without hearing or argument, and without affording plaintiff a reasonable time or opportunity to be heard or to present argument thereon.

(l) Any construction of Section 13a(1) of the Act which would limit its application in the case of carriers by rail-

road whose tracks and trains terminate their run (in a physical sense) at a river barrier forming the boundary between two States across such river and across the State boundary by ferry, and which would exclude such carriers when they so continue the carriage of their passengers by motor coach via river tunnel or bridge, would be in contravention of the Constitution of the United States, in that the same would constitute the giving of a preference to the ports of one State over those of another by a regulation of commerce, and would constitute a deprivation of property without due process of law: wherefore said section 13a(1) must be construed in a fashion as to include both the classes above identified so that it would not be in contravention of said Constitution.

12. The State of New Jersey and its Board of Public Utility Commissioners, who appeared in the proceedings before the Commission by filing the said petition or protest, are named as defendants herein, in lieu of intervention (to which plaintiff would consent), in order that they may be heard and be bound by the judgment herein as to said orders, although no judgment or affirmative relief is sought against said defendants.

Wherefore, plaintiff, New York, Susquehanna and Western Railroad Company demands:

1. That process issue out of this Court against United States of America, Interstate Commerce Commission, State of New Jersey and Board of Public Utility Commissioners of New Jersey as provided by law.

[fol. 7]

2. That a court constituted as required by Title 28 U.S.C. Sections 2284 and 2325 consisting of three Judges, at least one of whom is a Circuit Judge, be convened and that said court so constituted and convened shall hear and determine this cause.
3. That the court of three Judges upon final hearing enter a judgment permanently suspending, enjoining, annulling and setting aside the orders of January 18, 1961 and May 10, 1961 entered by the Interstate Com-

merce Commission in dismissing the notice filed by the plaintiff.

4. That plaintiff have such other and further relief in the premises as to the Court may seem proper and just.

Lum, Biunno & Tompkins, Attorneys for Plaintiff,
605 Broad Street, Newark 2, N.J., By V. P. Biunno.

[fol. 8]

EXHIBIT "A" TO COMPLAINT

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 4, held at its office in Washington, D. C., on the 18th day of January, A. D. 1961.

Finance Docket No. 21417

NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY DISCONTINUANCE OF PASSENGER SERVICE BETWEEN NEW YORK, N.Y., AND BUTLER, N.J.

It appearing, That on December 30, 1960, the New York, Susquehanna and Western Railroad Company filed with this Commission notices purportedly under section 13a(1) of the Interstate Commerce Act, as amended, that effective January 30, 1961, said carrier will discontinue service of its passenger trains Nos. 908, 910, 916, 919, 923, 929 and 915 allegedly operating between Butler, N.J., and New York, N.Y., serving numerous intermediate stations;

It further appearing, That by petition filed January 9, 1961, the State of New Jersey and its Board of Public Utilities Commissioners request this Commission to enter upon an investigation of the proposed discontinuance and petitioners move that the instant proceeding be dismissed without prejudice since the trains actually operate between Butler, N.J., and the Susquehanna Transfer, a point also

situated within the State of New Jersey, and in view thereof the proposal does not fall within the purview of section 13a(1) of the Interstate Commerce Act since the trains actually operate solely within the State of New Jersey and not "from a point in one State to a point in any other State" as provided by said section 13a(1);

It further appearing. That each of the trains proposed to be discontinued operate solely within the State of New Jersey and that therefore the said notice filed December 30, 1960, by the New York, Susquehanna and Western Railroad does not constitute a notice properly filed under the provisions of section 13a(1) of the Interstate Commerce Act;

It is ordered. That the notice filed December 30, 1960, by the New York, Susquehanna and Western Railroad in the instant proceeding be, and it is hereby, dismissed for lack of jurisdiction.

By the Commission, Division 4.

HAROLD D. McCoy
Secretary

(SEAL)

[fol:9]

EXHIBIT "B" TO COMPLAINT

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 10th day of May, A. D. 1961.

Finance Docket No. 21417

**NEW YORK, SUSQUEHANNA AND WESTERN
RAILROAD COMPANY DISCONTINUANCE OF
PASSENGER SERVICE BETWEEN NEW YORK,
N.Y., and BUTLER, N.J.**

Upon consideration of (1) the notice and supporting data filed December 30, 1960, by the New York, Susquehanna and Western Railroad Company under section 13a(1) of

the Interstate Commerce Act proposing discontinuance of certain passenger trains allegedly operating between Butler, N.J., and New York, N.Y., (2) the order of the Commission, Division 4, dated January 18, 1961, dismissing said notice for lack of jurisdiction, (3) documents dated January 27 and February 17, 1961, by said railroad, titled Reply to Petition of State of New Jersey and its Board of Public Utility Commissioners and Request for Extension of Time and Amended Reply, and (4) a petition, filed February 20, 1961, by said railroad requesting reconsideration of the Commission's order dated January 18, 1961; and

It appearing, That a so-called Petition of the State of New Jersey and its Board of Public Utility Commissioners constituted one of approximately 100 protests to the discontinuance proposal of the railroad and was received and treated as such; that the documents filed by New York, Susquehanna and Western Railroad Company titled Reply and Amended Reply to Petition of the State of New Jersey, etc., constitute a reply to said protest;

It further appearing, That due and timely execution of the Commission's functions under the provisions of section 13a(1) imperatively require that a decision be reached in respect to a notice filed thereunder prior to the proposed effective date of said notice, and, thus, preclude deferment of a decision awaiting the filing of replies to protests or other pleadings;

It further appearing, That the material matters set forth in said reply and amended reply have been incorporated in said petition for reconsideration filed February 20, 1961, that said petition has been considered and that no showing has been made warranting reconsideration of the said order of January 18, 1961, dismissing said notice for want of jurisdiction;

It is ordered, That said petition be, and it is hereby, denied.

By the Commission.

HAROLD D. MCCOY,
Secretary

(SEAL)

[fol. 16]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

[Title omitted]

ANSWER—Filed June 5, 1961

Defendants, State of New Jersey and Board of Public Utility Commissioners of the State of New Jersey in answer to the Complaint state as follows:

1. The allegations of paragraph 1 of the Complaint are admitted.

2. The allegations of paragraph 2 of the Complaint are admitted, except insofar as they may state or imply that jurisdiction in this Court is based upon jurisdiction of the Interstate Commerce Commission to have entertained discontinuance of the trains in question, which part is denied.

3. The allegations of paragraph 3 of the Complaint are admitted.

4. The allegations of paragraph 4 of the Complaint are admitted except that any portion thereof alleging or implying that the Interstate Commerce Commission had jurisdiction over Plaintiff's application to discontinue the service in question is denied.

[fol. 17] 5. The allegations of paragraph 5 of the Complaint are admitted.

6. The allegations of paragraph 6 of the Complaint are admitted, except that portion thereof alleging that the notice filed by the Plaintiff was properly filed pursuant to Section 13(a)1 of the Interstate Commerce Act, Title 49 U.S. Code, is denied.

7. The allegations of paragraph 7 of the Complaint are admitted.

8. The allegations of paragraph 8 of the Complaint are admitted except that portion thereof alleging that the notices were mailed to the Governor of the State of New York and were posted in the Plaintiff's facilities, as to which

the defendants state that they are without knowledge or information sufficient to form a belief.

9. The allegations of paragraph 9 of the Complaint are admitted.

10. The allegations of paragraph 10 of the Complaint are admitted except that portion thereof alleging that the Plaintiff has a right under Rule 23 to file a reply to the protest to the proposed discontinuance, which allegation is denied.

11. The allegations of paragraph 11 of the Complaint are denied.

12. The defendants are without sufficient knowledge or information to form a belief as to the allegations of paragraph 12 of the Complaint.

Dated: June 2, 1961.

David D. Furman, Attorney General of New Jersey,
Attorney for Defendants, State of New Jersey and
Board of Public Utility Commissioners, By:
Anthony D. Andora, Deputy Attorney General.

[fol. 21]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

[Title omitted]

JOINT ANSWER OF THE UNITED STATES OF AMERICA AND THE
INTERSTATE COMMERCE COMMISSION—Filed July 12, 1961

Defendants, United States of America and the Interstate
Commerce Commission, in answer to the complaint state
as follows:

I.

Admit the allegations of paragraphs 1 and 3 through 9
of the complaint.

II.

The allegations of paragraph 2 of the complaint are admitted except the last sentence thereof alleging jurisdiction in this Court under the Administrative Procedure Act, which is denied.

III.

The allegations of paragraph 10 of the complaint are admitted except that portion thereof alleging that plaintiff had a right under Rule 23 to file a reply to the protest to the proposed discontinuance, which is denied.

IV.

Deny the allegations contained in paragraph 11 of the complaint.

[fol. 22] Except as expressly admitted herein, defendants deny each and all of the allegations contained in the complaint to the extent that they are inconsistent with the averments of this answer or inconsistent with the orders of the Commission challenged by the complaint.

Wherefore, the United States of America and the Interstate Commerce Commission pray that the relief requested in the complaint be denied; that the complaint be dismissed, and that costs be assessed against the plaintiff.

John H. D. Wigger, Attorney, Department of Justice,
Washington 25, D. C.;

Lee Loevinger, Assistant Attorney General;

Chester A. Weidenburner, United States Attorney,
District of New Jersey, Newark, New Jersey;

Attorneys for the United States of America.

C. H. Johns, H. Neil Garson, Associates General
Counsel, Interstate Commerce Commission, Wash-
ington 25, D. C.;

Robert W. Ginnane, General Counsel;

Attorneys for the Interstate Commerce Commission.

[fol. 23] Certificate of Service (omitted in printing).

[fol. 72]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action No. 401-61

NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY,
Plaintiff,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION,
STATE OF NEW JERSEY, and BOARD OF PUBLIC UTILITY
COMMISSIONERS OF THE STATE OF NEW JERSEY, Defendants.

Appearances:

Luni, Biunno & Tompkins, Esqs., By Vincent P. Biunno,
Esq., Attorneys for plaintiff.

David M. Satz, Jr., Esq., United States Attorney,
By Raymond A. Young, Esq., Assistant United States
Attorney, and H. Neil Garsen, Esq. (D. C. Bar),
For the United States of America and Interstate
Commerce Commission, with John H. D. Wigger,
Esq., Lee Loevinger, Esq., C. H. Johns, Esq., Robert
W. Ginnane, Esq. (D. C. Bar), Of Counsel for the
Federal Government.

David D. Furman, Esq., Attorney General of the State
of New Jersey, By Richard Green, Esq., Deputy
Attorney General, For the State of New Jersey and
Board of Public Utility Commissioners.

OPINION—December 7, 1961

Before: Honorable Gerald McLaughlin, C.J., Honorable
Phillip Forman, C.J., Honorable Reynier J. Wortendyke,
Jr., D.J.

WORTENDYKE, D.J.

In this action the plaintiff, Susquehanna, seeks a judgment setting aside two certain "orders" of the Interstate Commerce Commission made on January 18, 1961 and May 10, 1961, respectively.

[fol. 73] This Court has jurisdiction by virtue of the provisions of 28 U.S.C. § 1336, which is being exercised appropriately as a three-judge court in accordance with the procedure prescribed by §§ 2321 to 2325 inclusive, and § 2284 of the same Title.

The Commission's order of May 10, 1961 was a denial of a petition for reconsideration of its order of January 18, 1961. Thus plaintiff exhausted its administrative remedy before the Commission before coming here. 49 U.S.C. § 17(9); *United States v. Abilene & Southern Railway Co.*, 1924, 265 U.S. 274.

Susquehanna operates a line of railroad as a common carrier for the transportation of passengers from Butler, New Jersey, to New York City. For its corporate history, see *In re New York, S. & W. R. Co.*, 3 Cir. 1940, 109 F. 2d 988. The railroad runs three passenger trains in each direction daily, except Saturdays, Sundays and holidays, during commuters' hours only, and no mail, baggage or express is handled thereon. If the operation of these trains is discontinued, no passenger service will be furnished by the carrier. Each train consists of a single-unit diesel locomotive and a single trailing passenger car, and has a crew consisting of an engineer, a fireman, a conductor and a brakeman. Although its trains do not travel eastwardly of a transfer point in North Bergen, New Jersey, its passengers for and from New York City are transported by bus, via the Lincoln Tunnel beneath the Hudson River, between that transfer point and the bus terminal of the Port of New York Authority at 41st Street and Eighth Avenue, in Manhattan. The buses so employed are owned and operated by Public Service Coordinated Transport, a New Jersey corporation, unaffiliated but under contract with the plaintiff.

Susquehanna emerged from reorganization proceedings under § 77 of the Bankruptcy Act, in 1953. For the year

[fol. 74] 1960, the cost of operating the trains which Susquehanna seeks to discontinue, including depreciation of locomotives and cars, is alleged to exceed the revenues therefrom by \$117,214.

The provisions of Part I of the Interstate Commerce Act apply to Susquehanna. Its railroad includes terminal facilities for the transportation of its passengers and such transportation includes a contract bus service as an instrumentality or facility for the carriage of its passengers between its transfer point in New Jersey and its terminal in New York. Such bus transportation must be considered as performed by Susquehanna, and is subject to regulation "in the same manner as, the transportation by railroad . . . to which such (bus) services are incidental." 49 U.S.C. § 302(c). See *New York Dock Railway v. Pennsylvania Railroad Co.*, 3 Cir. 1933, 62 F.2d 1010, cert. den. 289 U.S. 750; *United States v. Motor Freight Express*, D.C. N.J. 1945, 60 F.Supp. 288. The Interstate Commerce Commission has regulatory jurisdiction over Susquehanna and its contract bus facility despite the fact that the railroad is a New Jersey corporation whose entire trackage is within that State. *Cincinnati, New Orleans & Texas Pacific Railway v. Interstate Commerce Commission*, 1896, 162 U.S. 184; *Interstate Commerce Commission v. Detroit, Grand Haven & Milwaukee Railway Co.*, 1897, 167 U.S. 633, 642. The Commission has recognized and exercised that jurisdiction. See *New York, S. & W. R. Co.*, Common Carrier Application (1942) 34 M.C.C. 581; on rehearing (1946) 46 M.C.C. 713. See also *Commutation Fares*, New York, S. & W. R. Co. (1951) 280 I.C.C. 31. In its Local Passenger Tariff S-W 11, issued September 10, 1960, effective September 21, 1960, under Authority of Special Permission of the Interstate Commerce Commission in Finance Docket No. 20567, New York, Susquehanna & Western Railroad [fol. 75] Company—Abandonment of Operation Jersey City, N.J., dated August 8, 1960, plaintiff carrier advertises its fares for passenger transportation throughout its line extending between New York, N.Y., and Butler, N.J.; an aggregate distance of 37.9 miles. Paragraph 11 of the carrier's Rules and Regulations, published in its said Tariff, is captioned, and reads as follows:

"Motor-Coach Terminal Service—New York, N.Y.

"Available only to passengers holding tickets reading as described in paragraph 1 below, upon payment of charge shown in paragraph 2 below:

"1. To or from stations on the New York, Susquehanna and Western Railroad Company, Babbitt, N.J., and stations West thereof, on the one hand, and New York, N.Y., via the Susquehanna Transfer, N.J., on the other.

"2. Motor-coach fare in each direction between North Bergen, N.J. and New York, N.Y., 25 cents."

Erie's discontinuance of its ferry service pursuant to the provisions of 49 U.S.C. § 13a(1) had deprived plaintiff of the availability of this ferry service for its passenger transportation into and out of New York City. For background history of the Erie-passenger ferry abandonment, see *State of New Jersey, et al. v. United States of America, et als.*, D.C. N.J. 1958; 168 F.Supp. 324, affd. 1959, 359 U.S. 27, reh. den. 359 U.S. 950.

On December 30, 1960 Susquehanna filed with the Interstate Commerce Commission, pursuant to the provisions of section 13a(1) of the Interstate Commerce Act, a Notice that the carrier would discontinue service of all of its passenger trains described as "operating" between Butler, New Jersey and New York City, and serving various intermediate stations in New Jersey en route. A copy of plaintiff's Notice was served by mail, on December 29, 1960, upon the Governor of the State of New Jersey, the Secretary of the Board of Public Utility Commissioners of the State of New Jersey, the Governor of the State of New York, [fol. 76] the Secretary of the Public Service Commission of the State of New York, the Assistant Postmaster General, and the Railway Labor Executives' Association, and posted in each of Susquehanna's railroad stations, in the Port of New York Authority Bus Terminal in New York City, in each of the motor coaches operated by Public Service Coordinated Transport which carry passengers from and to plaintiff's trains, and in each passenger car of each of those trains.

On January 9, 1961, the State of New Jersey and its Board of Public Utility Commissioners filed a petition with the Interstate Commerce Commission praying that an investigation of plaintiff's proposed train discontinuance be entered upon by the Commission, and that plaintiff's Notice be dismissed without prejudice, upon the ground that its case, before the Commission was improperly brought under section 13a(1). To that petition Susquehanna filed an Amended Reply on February 20, 1961, wherein the carrier joined issue upon the contentions made in the petition. By order of Division 4 of the Commission, made on January 18, 1961, the proceeding instituted by plaintiff's Notice was dismissed for lack of jurisdiction because the Commission found that each of the trains proposed to be discontinued by the plaintiff operates solely within the State of New Jersey. The Commission concluded that Susquehanna's Notice was, therefore, improperly filed under section 13a(1) of the Act. On February 20, 1961, the Railroad filed a Petition for Reconsideration of the Commission's order [fol. 77] of January 18, 1961. The Petition for Reconsideration was denied by the Commission's order of May 10, 1961.

The Commission's refusal to reconsider its order denying jurisdiction of the proceeding instituted by the plaintiff under section 13a(1) of the Act constitutes a proper basis for the exercise of the jurisdiction of this Court created by 49 U.S.C. § 17(9) and 28 U.S.C. § 1336. The present action presents the single question whether the provisions of section 13a(1) have been appropriately invoked by the plaintiff for the purpose of effecting a discontinuance of its

¹ Carrier's amended reply to the petition of the State and Board disclosed that day-to-day counts of interstate and intrastate passengers using each of the trains which carrier desired to discontinue showed the following daily averages:

<i>Train No.</i>	<i>Total</i>	<i>Interstate</i>	<i>Intrastate</i>
908	47.7	39.7	8.0
910	126.4	120.1	6.3
916	112.5	91.2	21.3
919	47.9	31.5	16.4
923	120.1	118.6	1.5
929	37.0	34.5	2.5

passenger trains enumerated in the Notice filed with the Commission. The position of the defendants in the case is disclosed in their contention that section 13a(1) is applicable only to the discontinuance of "the operation or service of any train or ferry operating from a point in one State to a point in any other State." Because the trains which plaintiff would discontinue do not actually run across the dividing line between New Jersey and New York, but only between points within the State of New Jersey, defendants argue that application for relief before the Interstate Commerce Commission is governed by subsection 13a(2).² Defendants United States and Interstate Commerce Com-[fol. 78] mission further assert that "the Legislative history of section 13a(1) supports the view that it is intended to allow discontinuance of only trains or ferries, but not of all the rail transportation operation from a point in one State to a point in another State."³ They do not deny

² The Conference Report upon S-3778, 85th Cong. 2d Sess. (13 U.S. Code Cong. & Adm. News, p. 3250), has this to say respecting the proposed new section 13a embodied in section 5 of the Bill: "Paragraph (1) deals with the discontinuance or change of the operation or service of a train or ferry—operating from a point in one State to a point in any other State * * *. A procedure is set up whereby the carrier or carriers concerned may discontinue or change the operation or service (notwithstanding State law) upon giving 30 days' notice to the Interstate Commerce Commission (as well as certain other notice) of intention to do so.

"Paragraph (2) of the proposed new section 13a, * * * deals with the discontinuance or change, in whole or in part, by a carrier or carriers of the same class referred to in paragraph (1), of the operation or service of any train or ferry operated 'wholly within the boundaries of a single State.' The paragraph would operate where such carrier or carriers desire to discontinue or change any such operation or service, and where (1) the discontinuance or change is prohibited by the constitution or statutes of a State, (2) where the State authority having jurisdiction has denied an application duly filed for authority to discontinue or change the operation or service, or (3) where the State authority having jurisdiction shall not have acted finally on such application within 120 days from the presentation thereof. * * *"

³ If the plaintiff intends to terminate *all* railroad transportation over its line between Butler, New Jersey and New York City, the Commission would have clear jurisdiction to entertain its application for leave to do so under section 1(18) of the Act. This Court has already stated in *Board of Public Utility Commissioners v.*

that plaintiff is an interstate carrier, and they concede that it performs its interstate function in part by the use of the contract bus service into and from New York City.

While the defendants are correct in asserting that the trains which the plaintiff seeks to discontinue *more* exclusively within the State of New Jersey, the interstate *transportation* of passengers which the plaintiff is authorized and required by the Commission to provide (49 U.S.C. § 1(4)), is achieved only by means of the combined facilities of those trains and of the bus service which complements them. While it is also true that section 13a(1) contains the significant phrase "the operation or service of any train or ferry," referring to the particular transportation which may be discontinued or changed upon compliance with the other provisions of the section, we are unable to agree with the insistence of defendants that the word "operation" must be equated to "movement." There being no provision in the Act which makes such definition mandatory, we are at liberty to apply the ordinary meaning of the term, which, when used intransitively, means to work, act, or function. To strictly construe 13a(1) as applicable only to a train or ferry as an instrumentality of interstate transportation is to disregard other provisions of the statute, and thwart the apparent purpose of the Congress in adopting it. In construing remedial legislation, narrow or limited construction is to be eschewed. Rather, in this field, liberal construction in the light of the prime purpose of the legislation is to be employed. *St. Mary's Sewer Pipe Co. v. Director*, 3 Cir. 1959, 262 F.2d 378; citing

United States, 1957, 158 F.Supp. 98, at page 100, that "It is equally sound that the Commission possesses the right to allow complete abandonment of a railroad branch line although the latter be located wholly within a State. *State of Colorado v. United States*, 1926, 271 U.S. 153, * * *. Under that opinion if the contemplated stoppage of the Weehawken passenger ferry effects the complete abandonment of a line of railroad or portion of a line of railroad, the Commission's action was proper. If it is merely the elimination of part of the service of that line, the Commission has no justification for assuming control of the proceeding." That language was used before the new section 13a became law. We are not here called upon to determine whether the Commission in the present case derives jurisdiction from § 1(18).

Lilly v. Grand Trunk Western R. Co., 1943, 317 U.S. 481; *Swinson v. Chicago, St. Paul, M. & O. Ry.*, 1935, 294 U.S. 529; *Sablowsky v. United States*, 3 Cir. 1938, 101 F.2d 183. The Act must be read and considered as a whole in the light of national transportation policy. *American Trucking Associations, Inc. v. United States*, D.C. D.C. 1959, 170 F.Supp. 38.

In *Board of Public Utility Commissioners of the State of New Jersey, et al. v. United States*, 1957, 158 F.Supp. 98, this Court held that the proposed discontinuance by the New York Central Railroad Company of its passenger ferries between points in New Jersey and the City of New York would constitute but a partial abandonment of a portion of a line of its railroad, which the Interstate Commerce Commission then had no authority to permit, because 49 U.S.C. § 1(18) provided only for the abandonment of "all [fol. 80] or any portion of a line of railroad." Accordingly, this Court set aside a certificate granted by the Commission, authorizing the railroad to discontinue its passenger service while continuing to transport freight by surface vessel across the Hudson River. In that case the adoption of the Transportation Act of 1958 was foreseen by the Court when it said, at p. 103 of the opinion: "The Congress may in its wisdom decide to grant the requisite authority, although as yet there is no intimation of this from the legislative history, but until such time, the Commission, strictly a creature of its creating statute, is without the power to permit the discontinuance of this partial service." It is quite obvious that this Court's construction of section 1(18) of the Transportation Act of 1920 emphasized the need of congressional legislation to permit of the very relief which this Court had found unavailable. The answer to that need was ultimately given in section 13a(1) of the Transportation Act of 1958. Accordingly, by invoking the provisions of this newly added section, other railroads successfully achieved the discontinuance of passenger ferry service across the Hudson River, while still continuing to operate as interstate common carriers by rail. (*State of New Jersey, et al. v. United States, et al.* (supra).) It seems to follow inevitably that the contract buses, by means of which plaintiff had been performing its service as an inter-

state carrier, must be considered, as were the ferry facilities, to constitute a portion of plaintiff's line of railroad within the jurisdiction of the Commission.

The exclusiveness of the Commission's jurisdiction over terminal facilities and interterminal services of interstate carriers was emphasized in *Central Transfer Co. v. Terminal Railroad Association of St. Louis*, 1933, 288 U.S. [fol. 81] 469, and in *City of Chicago v. Atchison, T. & S. F. Ry. Co.*, 1958, 357 U.S. 77. In the latter case a municipal ordinance required that a motor carrier serving interstate connecting railroads for the transportation of passengers across the City, first obtain a certificate of convenience and necessity from the Commissioner of Licenses, and the approval of the City Council, before it could lawfully engage in that business. The United States Supreme Court held that the Interstate Commerce Act, 49 U.S.C. § 1, et seq., precluded the City from exercising any veto power over the transfer service when performed by the interstate railroads or by their chosen agents because such service was (p. 86) "at least authorized, if not actually required, under the Act as a reasonable and proper facility for the interchange of passengers and their baggage between connecting lines," and "§ 302(c) of the Act provides that motor vehicle transportation between terminals, whether performed by a railroad or by an agent or a contractor of its choosing, shall be regarded as railroad transportation and shall be subject to the same comprehensive scheme of regulation which applies to such transportation." Further, at pp. 87 and 88 of the same opinion, we find an interpretation of congressional policy in the following language of Mr. Justice Black: "The various provisions set forth above manifest a congressional policy to provide for the smooth, continuous and efficient flow of railroad traffic from State to State subject to federal regulation. In our view it would be inconsistent with this policy if local authorities retained the power to decide whether the railroads or their agents could engage in the interterminal transfer of interstate passengers. . . . National rather than local control of interstate railroad transportation has long been the policy of Congress. It is not at all extraordinary that Congress [fol. 82] should extend freedom from local restraints to

the movement of interstate traffic between railroad terminals."

In *Transit Commission v. United States*, 1933, 289 U.S. 121, the language of section 1(18) of the Act was held to apply to a trackage agreement which enabled an interstate carrier to extend its traffic beyond its own terminus over the line and to and from the terminus of another carrier. At page 127 of the opinion in that case, the Court states that: "Prior to the Transportation Act, 1920, regulations coincidentally made by federal and state authorities were frequently conflicting, and often the enforcement of state measures interfered with, burdened and destroyed interstate commerce. Multiple control in respect of matters affecting such transportation has been found detrimental to the public interest as well as to the carriers. Dominant federal action was imperatively called for. * * * (Continuing on p. 128.) * * * The Act, including paragraph (18) and related provisions, is construed to make federal authority effective to the full extent that it has been exerted and with a view of eliminating the evils that Congress intended to abate." See also *Southern Railway Co. v. Reid*, 1912, 222 U.S. 424.

All parties concede that the question which we are called upon to answer is whether, under the circumstances disclosed in *Susquehanna's* petition to the Commission, relief should be afforded under subdivision (1) or under subdivision (2) of section 13a of the Act. Plaintiff has been, and is now discharging its obligation as an interstate railroad common carrier by a combination of train and bus service, furnishing passenger carriage between New York and New Jersey. The bus service complements that of the train; the train service complements that of the bus. In combination the two facilities operate from a point or points in one [fol. 83] State to a point in another State. A construction of the language employed in subdivision (1) of section 13a which would involve a divorcement or limitation of the jurisdiction of the Commission, and the intrusion of that of the Board of Public Utility Commissioners over the existing facilities employed by *Susquehanna*, would preclude the attainment of the objective obviously contemplated by the Congress.

We, therefore, conclude that the Commission had jurisdiction over the proceeding instituted by Susquehanna under the provisions of section 13a(1) and that its order of January 18, 1961 refusing to take jurisdiction thereof was contrary to law, and should be reversed.

McLAUGHLIN, Circuit Judge, dissenting.

Prior to the enactment of Section 13(a)(1) of the Interstate Commerce Act there was no authority then existing which countenanced abandonment by a carrier of its passenger ferry service between New Jersey and New York. Board of Public Utility Commissioners of New Jersey v. United States, 158 F.Supp. 98 (D.C. N.J. 1957). Thereafter the present Section 13(a)(1) was added to the Interstate Commerce Act, 49 U.S.C.A. Section 13(a)(1) effective August 12, 1958. That specifically gave carriers, subject to the mechanics of the section, the right "*to the discontinuance or change, in whole or in part, of the operation or service of any train or ferry operating from a point in one State to a point in any other State* * * * ." (Emphasis supplied.)

There is no denial that the section was directed to a particular train or ferry and the legislative history makes this crystal clear. The section was used almost immediately [fol. 84] for its avowed purpose i.e. to justify the extinguishment of the passenger ferry with which the Board of Public Utility Commissioners, etc. litigation, supra, was concerned and of the Erie passenger ferry (also used by complainant). See State of New Jersey, et al. v. United States, et als., 168 F.Supp. 324 (D.C. N.J. 1959) (New York Central case); State of New Jersey, et al. v. United States, et al. (Erie and New York, Susquehanna case), 168 F.Supp. 342 (D.C. N.J. 1959). As finally passed, there was not the slightest idea that 13(a)(1) could be at all available regarding any train which operates within a State, whose origin and destination are within the State—that is, any train with intrastate characteristics—together with the facilities used by the train, shall be completely under the authority of the State public utilities commission, and shall not be in any way affected by the language of this particular pro-

posals, to which the Senator from Georgia objects." Declaration by Senator Smathers, author of the then bill, 104 Cong. Rec. June 11, 1958 p. 10852. At p. 10854 of the same record Senator Smathers stated an underlying principle of the amendment to be that "If a train originates within a State . . . and ends within a State, without crossing a State line, that particular train could be discontinued only with the approval of the State regulatory agency, under the amendment." There was never any change in that fundamental concept, suggested or authorized. Throughout the legislative history it is plain that, aside from a particular train, the only other item to be covered by the amendment was a ferry. Buses were neither mentioned or considered. It definitely was never intended by Senator Smathers that an element foreign to the avowed objective of the legislation be concealed within his frank commitment and which would be urged later as coming under 13(a)(1). The [fol. 85] Interstate Commerce Commission itself, which had so readily acquiesced in the end of the mentioned passenger ferry service between New Jersey and New York, at no time ever attempted to distort the meaning of 13(a)(1) by construing it as allowing discontinuance of purely intrastate trains because buses took passengers from them at the end of the railroad in New Jersey and transported them to New York.

The statute is a lean, lucid law. It cannot be misconstrued as it stands. The majority opinion refuses to take on that impossible task. So it rests its reversal of the Interstate Commerce Commission on the proposition that what the latter does in its decision is "thwart the *apparent* purpose of Congress in adopting it." (Emphasis supplied.) Actually, the true purpose of Congress is expressed in the unmistakable language of 13(a)(1) itself. That language cannot be wrenched apart to absorb the expedient endeavor to do now what was never contemplated when the amendment was enacted.

It is argued that "bus" must be taken as included in the "service of any train". That cannot conceivably make sense where "ferry", no more or less important in the circumstances than "bus", was deliberately and directly named and the phrase "service of any" applied to it ex-

actly as to "train". If 13(a)(1) had been meant to contain the power to wipe out an entire intrastate railroad passenger service by tying it into the interstate connecting buses, the word "bus" would have been placed in the amendment as was the word "ferry". If that had occurred, in all probability, the amendment would never have passed the Senate. It does seem rather conclusive that all of the legislative history re the amendment, both affirmative and negative, vividly establishes that its language is meaningful and is exactly what was agreed to.

[fol. 86] The railroad objects to the definition of a "train" as given by the United States Supreme Court in *United States v. Erie RR.*, 237 U.S. 402, 407 (1915), where the Court said that a train " * * * consists of an engine and cars which have been assembled and coupled together for a run or trip along the road." The railroad would put this in the same category as Miss Stein's "a rose is a rose * * *." It might be noted that to date, a rose is still a rose. Also that as far as Section 13(a)(1) of the Interstate Commerce Act is concerned, within its categorically limited purpose and language, a "bus" is neither " * * * the operation or service of any train or ferry operating from a point in one State to a point in any other State * * *."

For plaintiff to prevail the Interstate Commerce Commission must be held to have grievously erred in law by concluding it had no jurisdiction to permit the railroad to divest itself of its passenger service. Even on this legal question, the Commission's deep, special knowledge of the problem in this case is of the utmost importance. Admittedly it had no right to sanction abandonment of New Jersey-New York harbor ferries until Section 13(a)(1) became the law. Admittedly it was completely familiar with the Smathers bill. It knew that under the resultant amendment to the Act, it was given the power to approve the discontinuance of a single train or ferry. It knew the amendment went no further than that. It knows that the kind of control involved in this action or otherwise was never sought for the Commission in 13(a)(1) by complainant, other carriers or anyone else. The Commission therefore rightly refused to accept complainant's present fantastic interpretation of Section 13(a)(1) proffered, not with any claim that it was ever

dreamt of when 13(a)(1) was passed, but under the trans-[fol. 87] parently unsupportable suggestion that "bus" must be taken as part of 13(a)(1) since the latter is "remedial legislation". In view of the success in obtaining legislation to do away with the ferries an equivalent result might be obtained as to buses. But meanwhile, the passenger trains, which plaintiff seeks to discontinue, operate solely within the State of New Jersey and the matter of their discontinuance is not within the jurisdiction of the Interstate Commerce Commission.

I would therefore uphold the Commission's dismissal of the proceeding.

[fol. 92] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action, No. 401-61

NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY,
Plaintiff,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, STATE OF NEW JERSEY, and BOARD OF PUBLIC UTILITY COMMISSIONERS OF THE STATE OF NEW JERSEY, Defendants.

FINAL JUDGMENT—January 9, 1962

This matter having come on for trial in the presence of Lum, Biunno & Tompkins (by Vincent P. Biunno, Esq.), attorneys for plaintiff, David M. Satz, Jr., Esq. (by Raymond A. Young, Esq.), United States Attorney, and H. Neil Garson, Esq., attorneys for the defendants United States of America and Interstate Commerce Commission, with John H. D. Wigger, Esq., Lee Loevinger, Esq., C. H. Johns, Esq., and Robert W. Ginnane, Esq., of Counsel with the

defendant United States of America, and David D. Furman, Esq. (by Richard Green, Esq.) Attorney General of the State of New Jersey, attorney for the defendant State of New Jersey and Board of Public Utility Commissioners of the State of New Jersey; and the court having examined and considered the record and order before it, and having heard and considered the argument and briefs of counsel thereon.

It is, on this 9th day of January, 1962, Ordered that final judgment be and it hereby is entered, determining that the provisions of section 13a(1) of the Interstate Commerce Act (49 U.S.C. sec. 13a(1)) were appropriately invoked by the plaintiff for the purpose of effecting a discontinuance of its passenger trains enumerated in the Notice filed with the defendant Interstate Commerce Commission; that said Commission had jurisdiction over the proceedings so instituted and that its order of January 18, [fol. 93] 1961, under review, was contrary to law and is hereby permanently suspended, enjoined, annulled and set aside;

And good cause appearing it is further ordered that the plaintiff railroad, its officers, agents, servants and attorneys are hereby restrained and enjoined from discontinuing passenger service under its said Notice or under this judgment, until the further order of this Court, pending appeal by the defendants to the Supreme Court of the United States, *without costs.* R.J.W., Jr.

Philip Forman, C.J., Reynier J. Wortendyke, Jr., D.J.

Circuit Judge Gerald McLaughlin notes his dissent, except as to the foregoing restraint,

[fol. 95]

IN UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action No. 401-61

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE
UNITED STATES—Filed March 6, 1962

I. Notice is hereby given that the State of New Jersey and the Board of Public Utility Commissioners of the State of New Jersey, appellants herein, hereby appeal to the Supreme Court of the United States from the final judgment entered in this action on January 9, 1962.

This appeal is taken pursuant to 28 U.S.C. § 1253.

II. The clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States.

III. The following question is presented by this appeal:

Whether the Interstate Commerce Commission lawfully dismissed the railroad's notice of train discontinuance for lack of jurisdiction under section 13a(1) of Title 49 United States Code Annotated when the trains operate exclusively in the State of New Jersey?

Respectfully submitted,

Arthur J. Sills, Attorney General of New Jersey,
Richard F. Green and William Gural, Deputy
Attorneys General of New Jersey, Attorneys for
Appellants, State of New Jersey and Board of
Public Utility Commissioners of the State of
New Jersey.

[fol. 97]

[Handwritten notation—Dec—30 '60]

BEFORE THE INTERSTATE COMMERCE COMMISSION

STATEMENT
IN RELATION TO PROPOSED DISCONTINUANCE
OF TRAIN SERVICE

Title 49, Chapter I, Subchapter A, Part 43, §43.5

NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY

Leon Leighton
Counsel
6 East 45th Street
New York 17, N. Y.

[fol. 98] (a) Exact corporate name and general office address of the carrier proposing the discontinuance:

New York, Susquehanna and Western Railroad Company
160 Market Street, Paterson 1, N. J.

(b) Name, title and post office address of counsel to whom correspondence regarding the notice should be addressed:

Leon Leighton, Counsel
6 East 45th Street
New York 1, N. Y.

(c) Complete description of the present service of the trains involved and of the discontinuance proposed:

New York, Susquehanna and Western Railroad Company (hereinafter called "Susquehanna") presently operates three trains in each direction between Butler, N.J., and Port of New York Authority Bus Terminal, in the Borough of Manhattan, New York City, N.Y. The total distance is 36.2 miles. The schedule of these trains is shown on

Susquehanna's timetable effective November 28, 1960, which is annexed as Exhibit 1 hereto.

The train service operates daily except Saturdays, Sundays and holidays, during commuter hours only. The three eastbound trains leave Butler between 6:26 and 7:14 a.m., arriving New York between 8:00 and 8:43 a.m. The three westbound trains leave New York between 4:50 and 5:30 p.m., arriving Butler between 6:22 and 7:02 p.m. Each train carries passengers only; no mail, baggage or express is handled. On Good Friday, Election Day, December 23 and December 30, Train 923, leaving New York at 5:17 p.m. and arriving Butler 6:42 p.m. does not operate. In place thereof, Train 915 is operated, leaving New York at 1:10 p.m. and arriving Butler 2:39 p.m.

A complete discontinuance of the operation of each of the foregoing trains is sought, so that Susquehanna will operate no passenger service whatsoever.

Each train is presently operated by a single-unit diesel engine, with a single trailing passenger car. The crew on each train consists of an engineer, a fireman, a conductor and a brakeman.

[fol. 99] The operation is by rail to a point called Susquehanna Transfer, located in the Township of North Bergen, N. J., thence to Port Authority Bus Terminal by contract bus operated exclusively for Susquehanna's passengers by Public Service Coordinated Transport. The foregoing operation makes these interstate trains within the purview of subdivision (1) of Section 13a of the Interstate Commerce Act. See extracts from reports of this Commission approving this contract bus operation, and from opinion of the United States Supreme Court, in Exhibit 2 hereto.

(d) A complete statement of the reasons for the proposed discontinuance or change of operation or service.

Section 13a(1) of the Interstate Commerce Act provides that, upon the filing of a notice of discontinuance of a train, the Commission may require the continuance of operation or service of such train for a period of one year only if "the Commission finds that the operation or service of such train or ferry [a] is required by public convenience

and necessity *and* [b] will not unduly burden interstate or foreign commerce" (italic supplied).

The basic reason for the proposed discontinuance is that finding [b] cannot be made in this case. The operation of Susquehanna's passenger service has been an undue burden on interstate commerce since 1947, and its continued operation threatens to drive Susquehanna into bankruptcy.

The Commission's inability to make finding [b] would in and of itself be a sufficient reason for not requiring the continuance of operation of the trains, even if the Commission should make finding [a]. However, even though finding [a] might have been warranted prior to November 8, 1960, it has not been warranted since that date in view [fol. 100] of the decision and order of the Commission in Finance Docket No. MC-228 (Sub No. 25) and related applications, *Hudson Transit Lines, Inc. Extension--Oakland, N. J.*

A. The operation of these trains will unduly burden interstate commerce

1. In 1953, Susquehanna emerged from reorganization under §77 of the Bankruptcy Act, after a proceeding which had lasted for sixteen years. Since that time, Susquehanna's out-of-pocket losses in its passenger operation have absorbed an increasingly disproportionate share of its freight earnings. This is shown on the tabulation for those years of the actual out-of-pocket passenger losses, the total freight earnings, and the percentages of the latter required to absorb the passenger losses (Exhibit 3 hereto). It will be noted that the percentages used as the numerator are the *actual out-of-pocket* losses. If the losses were computed on the basis of the formula approved by this Commission, which was reiterated in No. 31,954, *Railroad Passenger Train Deficit* (1959), they would have exceeded the freight earnings by a substantial margin in each year.

2. This drain on Susquehanna's earnings has now reached the point where it will force Susquehanna into bankruptcy again, unless the situation is immediately remedied. As is shown on Exhibit 3, Susquehanna's freight operations have shown *deficits* of \$71,316 for 1958 and

of \$185,045 for 1959. The addition of the out-of-pocket deficits in the passenger operation of \$307,979 for 1958 and of \$269,767 for 1959 (see Exhibit 3) has resulted in total deficits before fixed charges of \$379,295 for 1958 and of \$454,812 for 1959 (Exhibit 6 hereto). Susquehanna's deficit before fixed charges for the nine months ended September 1960 was \$200,772 (Exhibit 6), of which \$86,040 [fol. 101] represented the passenger deficit and \$114,732 represented the freight deficit. This experience for the past two and three-quarter years is in marked contrast with the Commission's forecast. In approving Susquehanna's reorganization plan, the Commission had found "that the reorganized Company's expectable earnings available for interest and other corporate purposes in a normal year . . . may be expected to range from \$700,000 to \$775,000." *New York, S. & W. R. Co. Reorganization*, 261 I.C.C. 101, 106 (1945). This finding was specifically approved by the bankruptcy court having jurisdiction over Susquehanna's reorganization, and by the United States Court of Appeals. *In re New York, Susquehanna & Western R. Co.*, 103 F. Supp. 981, 983 (D.N.J. 1951), *affd.* on opinion of Judge Smith below (196 F.2d 216 [C. A. 3d 1952]).

3. The fact that Susquehanna "did not have sufficient overall income to safely carry its passenger deficit, and that extraordinary consideration should be given to the financial aspects of its operations," has been pointed out by the Commission, by the Appellate Division of the New Jersey Superior Court, and by the New Jersey Board of Public Utility Commissioners.

i. The statement of this Commission is found in the report and order of Division 4 in Finance Docket No. 20266, *New York, Susquehanna & Western Railroad Company Abandonment of Operation, Jersey City, N. J.* (decided August 8, 1960), the pertinent extracts from which are set forth on Exhibit 4 hereto.

ii. The foregoing report of Division 4 quotes from the opinion of the Appellate Division of the New Jersey Superior Court in *Susquehanna, etc. Assn. v. Bd. of Pub. Util. Comm'rs*, 55 N. J. Super. 377, 151 A. 2d 9 (App. Div.

[fol. 102] 1959). Extracts from this opinion (which incorporate the findings of the New Jersey Board of Public Utility Commissioners) are set forth on Exhibit 5 hereto.

4. The report in Finance Docket No. 20266, *supra*, reflects Susquehanna's operations through 1958, and its balance sheet as of June 30, 1958. The record in that proceeding concluded with operations for 1958.

i. In its operations since that date, Susquehanna's railroad operations failed to earn its reduced fixed charges by \$588,354 in the year 1959, and by \$305,346 in the first nine months of 1960. This is shown on the income statement for the calendar years 1958 and 1959 and the first nine months of 1960 (Exhibit 6 hereto).

ii. Susquehanna's balance sheet as of September 30, 1959 showed a working capital deficit of \$409,444 (Exhibit 7 hereto).

5. For many years Susquehanna tried to alleviate the passenger deficit, which is chronic among commuter roads in the Eastern Territory, by improving passenger service in the hope that it would attract additional business.

i. Up to 1940, Susquehanna's trains all originated and terminated at Jersey City, whence service was afforded by connecting ferry and by Hudson & Manhattan Railroad to downtown Manhattan. In that year, Susquehanna established the transfer point at Susquehanna Transfer, from which connecting bus service was given to the Port Authority Bus Terminal in midtown Manhattan. This Commission found that the new service was a great convenience to the passengers, saving them a substantial amount of travel time. *New York, N. & W. R. Co. Common Carrier Application*, 46 M.C.C. 713, 715-16 (1946).

ii. At about the same time, an extension from the main line at Broadway Paterson to Straight Street in Paterson, which had been abandoned some years before, was put back [fol. 103] into service, in order to afford ready access to the central portion of Paterson.

iii. Prior to these improvements in service, Susquehanna had operated only ten trains in each direction to and from

New York. After the inauguration of the bus service, and the rebuilding of the Straight Street extension, Susquehanna added twenty-four trains in each direction between Paterson and the Port Authority Bus Terminal (46 M.C.C., *supra*, at pp. 717-18).

iv. In 1950, Susquehanna purchased four new RDC air conditioned cars for \$540,000, to perform the service on this Paterson-Port Authority Bus Terminal run. In 1951, Susquehanna purchased sixteen new stainless steel coaches for \$1,325,000, to perform the service on the Butler-Jersey City run. The latter coaches were not air conditioned but were otherwise thoroughly up to date and modern, and constituted more than half of the thirty modern coaches among the 1,300 in the New Jersey suburban service.

v. If the foregoing \$1,865,000 had been used to retire bonds, instead of for the purchase of new equipment, Susquehanna would have been saving \$121,200 per year in fixed interest payments. (Although the bonds bear interest at 4%, their market price during the period did not exceed 60.) Despite this substantial investment in new equipment, Susquehanna's passengers fell off from 1,888,487 in 1949 to 1,467,295 in 1956.

6. In 1956, Susquehanna realized that the only solution for its passenger deficit problem was to apply for a curtailment of service to that which was absolutely essential. Its passenger operations then consisted of thirty trains in each direction on weekdays, eighteen trains in each direction on Saturdays, and seventeen trains in each direction on Sundays. At that time, other common carrier [fol. 104] service was not available in the sector of Susquehanna's territory west of Hawthorne. Susquehanna therefore proposed to operate four trains from Butler to New York during the morning commuter hours, and four trains from New York to Butler during the evening commuter hours. These trains would of course include the area east of Hawthorne, where other common carrier service was available. Application for such curtailment was made to the New Jersey Board of Public Utility Commissioners in April 1956.

7. Extended hearings were held before the Board, the minutes running over 3,000 pages, and the exhibits to 225. The hearings were not concluded until April 1957.

8. At that time, the New Jersey Legislature passed a concurrent resolution directing the Board of Public Utility Commissioners to permit no further curtailment of passenger rail service in New Jersey pending the presentation of the final report of the New York-New Jersey Metropolitan Transit Commission to the Governors and Legislators of New York and New Jersey. In obedience to this resolution, the New Jersey Board suspended all further proceeding on Susquehanna's application.

9. Susquehanna appealed this order to the New Jersey Supreme Court. In November 1957, that Court reversed the order of the Board and remanded the matter to the Board for determination on the merits. *In re N. Y. Susquehanna & Western R. R. Co.*, 25 N. J. 343, 136 A. 2d 408 (1957).

10. The Board thereupon authorized Susquehanna to reduce its passenger service to twelve trains in each direction on weekdays, seven trains eastbound and five trains westbound on Saturdays, and four trains in each direction on Sundays. Susquehanna appealed this decision to the Appellate Division of the New Jersey Superior Court. In [fol. 105] May, 1959, that Court modified the Board's order, to provide for further curtailment of the service to seven trains in each direction on weekdays, and two eastbound trains on Saturdays. *Susquehanna, etc. Assn. v. Bd. of Pub. Util. Comm'rs*, 55 N. J. Super. 377, 151 A. 2d 9 (App. Div. 1959).

11. The long delay in completing these legal proceedings in New Jersey caused Susquehanna to sustain out-of-pocket losses of \$465,000 during the period from April 1956 to May 1959, in the operation of trains which the Board of Public Utility Commissioners or the Appellate Division of the Superior Court finally concluded were not required by public convenience and necessity.

12. The impact of this burden made it necessary for Susquehanna to seek further relief. By decision and order

of the New Jersey Board of Public Utility Commissioners in Docket No. 11550 (decided December 21, 1959), Susquehanna was authorized to reduce the service to four trains in each direction on weekdays only. By subsequent order of the New Jersey Board of Public Utility Commissioners in Docket No. 11884 (decided July 14, 1960), Susquehanna was authorized to reduce the service to the present operation of three trains in each direction on weekdays only.

13. As is more fully set forth in the answer to Question (h) below, the operation of the three pairs of trains which are involved here shows the following actual out-of-pocket losses for the years 1958 and 1959 and the first nine months of 1960:

[fol. 106]

	1958	1959	First Nine Months—1960
908)	\$ 54,108	\$37,010	\$32,120
919)			
910)	30,044	16,523	13,435
923)			
916)	52,662	34,979	12,783
929)			
Total	\$136,814	\$88,512	\$58,338

14. The out-of-pocket loss declined from \$136,814 in 1958 to \$88,512 in 1959. If the first nine months of 1960 are projected to an annual basis, the actual out-of-pocket loss in that year would be \$77,784, a still further reduction. These reductions resulted from the curtailments of service authorized by the New Jersey Board of Public Utility Commissioners which are described in ¶12, *supra*.

15. However, the foregoing reduction in losses does not accurately reflect the undue burden on interstate commerce resulting from this situation, because the reduction was predicated upon a temporary reduction in the cost to Susquehanna of using the Erie passenger facilities at Jersey City, N. J., which would not continue in the future. This was fully treated in the Commission's report in Finance Docket No. 20266, *New York, Susquehanna & Western Railroad Company Abandonment of Operation, Jersey City, N. J., supra*.

i. For a period of years, Susquehanna operated its passenger trains into Jersey City pursuant to agreements (the last of which was effective March 1, 1940), by which Susquehanna was permitted to use the Erie's trackage from Croxton Yard to Jersey City, its terminal facilities at Jersey City, its ferry, and its New York City passenger station. The rental for this was \$42,500 per year. Finance Docket No. 20266, *supra*, page 3. Additional payments for [fol. 107] various services brought the total cost to about \$77,000 per year.

ii. The foregoing agreement was terminated in September 1955, but the parties agreed to continue the existing arrangement at a rental of \$100,000 a year. Payments were made on that basis until the discontinuance of the Erie ferry operation in December 1958. Finance Docket No. 20266, *supra*, pp. 3-4.

iii. Since December 1958, Susquehanna has been tendering rental payments at the rate of \$30,000 per year, and Erie has been accepting these payments on account. Subsequent to that date, Erie operated all of its passenger trains to and from the Hoboken, N. J., terminal of Lackawanna, so that Susquehanna remained as the only user of Erie's passenger terminal facilities. Erie contended that the \$30,000 rental being paid was grossly inadequate, that a fair and reasonable rental was about \$197,000, and asked that the Commission fix the rental at a proper amount. Finance Docket No. 20266, *supra*, p. 4.

iv. This application by Erie to fix a proper rental was not pressed only because the Commission permitted Susquehanna to abandon its use of the Jersey City facilities. Finance Docket No. 20266, *supra*, pp. 4-5.

16. The operating results shown in ¶13, *supra*, were based on the rental of \$100,000 actually being paid by Susquehanna for the year 1958, and on the rental of \$30,000 actually being paid by Susquehanna for the year 1959 and for the first nine months of 1960. If Susquehanna had been required to pay the rental of \$100,000 in 1959 and 1960, its annual out-of-pocket loss would have been \$70,000 greater. If Susquehanna had been required to pay the

rental of \$197,000 demanded by Erie, its annual out-of-pocket loss would have been increased by an additional \$97,000.

[fol. 108] 17. The report of the Commission in Finance Docket No. 20266, *supra*, indicates that it found substantial validity in Erie's claim that the rental of \$30,000 was grossly inadequate, and that if the Commission were called upon to fix the rental it might well fix it at a figure between \$100,000 and \$197,000. See extracts from this report, which are set forth on Exhibit 8 hereto.

18. Susquehanna realized that it could not continue indefinitely to use the Erie's Jersey City trackage and passenger facilities at the rental of \$30,000, which the Susquehanna tendered unilaterally. In order to avoid the possible hazard of an annual rental in the range of \$100,000 to \$197,000, Susquehanna applied to the Commission for permission to abandon the foregoing operation. That application was granted by Division 4 in Finance Docket No. 20266, *supra*. It became effective on September 21, 1960.

19. Exhibit 9 hereto gives Susquehanna's forecast of the results on an annual basis of what its passenger operations will be after abandonment of the Jersey City facilities. The expenses shown on the exhibit are the actual current expenses. The revenues are a projection on an annual basis of the actual revenues for the two five-day periods commencing respectively on October 17 and October 24, 1960. This exhibit is summarized below:

	908 & 919	910 & 923	916 & 929	Total
Expenses	\$60,755	\$60,960	\$60,547	\$182,262
Revenues	12,578	33,059	19,411	65,048
<hr/>				
Out-of-pocket loss	\$48,177	\$27,901	\$41,136	\$117,214

20. The annual deficit of \$117,214 after abandonment of the Jersey City facilities is \$39,430 greater than the annual deficit of \$77,784 prior to abandonment of the Jersey City facilities (see ¶14, *supra*). But this increase in the deficit is still substantially less than the rental of between \$100,000

[fol. 109] and \$197,000 which the Commission would in all probability fix for the use of Erie's facilities if Susquehanna continued to use them (see ¶17, *supra*).

21. This out-of-pocket loss of \$117,214 on passenger operations cannot be absorbed by Susquehanna; in view of the fact that its freight earnings show a deficit.

R. The operation of these trains is not required by public convenience and necessity.

22. When Susquehanna submitted its last application to the New Jersey Board (described in ¶12, *supra*), other common carrier service was still not available in the sector of Susquehanna's territory west of Wortendyke. While Susquehanna had applied to the New Jersey Board for complete discontinuance of Service, Susquehanna suggested that disposition of the application respecting the present six trains be deferred pending this Commission's determination on applications by three bus companies to serve that area. The application of Hudson Transit Lines was granted by the Commission on November 8, 1960. M.C.C. 228 (Sub-No. 25) and related applications: *Hudson Transit Lines, Inc. Extension—Oakland, N. J.* Inter-City Transportation Company (another of these bus lines) has extended its operations in another part of this area. As is more fully explained in the answer to (f) *infra*, other common carrier service is now available throughout Susquehanna's entire territory where it presently renders passenger service.

(c) The names of all railroads interchanging passengers or freight with the subject trains and the points of such interchange:

The subject trains do not interchange passengers with any other railroads. The subject trains do not carry any freight.

[fol. 110] (f) Description of other common carrier service, including service of the same carrier, of the same kind (passenger) rendered by the trains involved, between and at the points described in the notice, and other common carrier service available in the immediate territory?

1. The other common carrier service available in Susquehanna's entire territory is graphically shown on the two maps appended hereto, Exhibit 10A being Bergen County and Exhibit 10B being Passaic County.

2. A detailed comparison of the other common carrier service available at or about the time when Susquehanna's present trains are operated is appended hereto, as follows:

Exhibit-	Territory
11A	Oakland, Franklin Lakes and Wyckoff
11B	Wortendyke and Midland Park
11C	Hawthorne, Paterson and East Paterson
11D	Rochelle Park and Maywood

These comparative statements have been prepared in the following manner:

i. The average number of daily passengers on each of Susquehanna's trains is taken from the passenger counts which are Exhibits 13 hereto.

ii. The letters PABT are used to designate the Port of New York Authority Bus Terminal, the New York City terminus of all of Susquehanna's trains and of all bus lines involved.

iii. The schedules of the various bus companies and of the Erie Railroad are taken from the timetables in Exhibits 12. These are the actual timetables presently in effect, except that the timetable of Hudson Transit Lines is its proposed timetable which was marked Exhibit 15 in MCC 228 (Sub-No. 25), *supra*.

3. Detailed comparisons are not shown for the bus and rail service available from Butler and Pompton Lakes, [for 111] from Hackensack, or from Bogota, Ridgefield Park and Little Ferry. The reason is that the average number of passengers to and from each of these stations is less than one per day. However, the common carrier service available is shown on the maps (Exhibits 10) and on the timetables (Exhibits 12).

4. A detailed comparison of the intermediate local bus service available to Susquehanna's passengers is likewise not shown, because only a nominal number of passengers travel between the respective local points. However, the availability of other common carrier service is shown on the maps (Exhibits 10) and on the timetables (Exhibits 12).

5. Timetables of these other common carriers are appended hereto as the following exhibits:

Exhibit	Carrier	Points Served
12A	Erie-Lackawanna RR (Main Line)	Hawthorne and Paterson
12B	Erie-Lackawanna RR (Greenwood Lakes Division)	Pompton Lakes
12C	New Jersey & New York Railroad	Hackensack
12D	Manhattan Transit Co.	Paterson and East Paterson
12E	Westwood Transportation Lines	Rochelle Park, Maywood, Hackensack, Bogota, Ridgely Park, Little Ferry
12F	Hudson Transit Lines	Oakland, Franklin Lakes, Wyckoff
12G	Inter-City Transportation Co.—No. 41	Midland Park and Wrendyke
12H	Inter-City No. 30	Paterson
12I	Inter-City No. 35	Rochelle Park, Maywood, Hackensack
12J	Public Service Coordinated Transport—No. 165	Hackensack, Ridgely Park, Little Ferry
12K	Public Service No. 167	Ridgely Park, Little Ferry
12L	Public Service No. 168	Hackensack, Bogota, Ridgely Park, Little Ferry

**Public Service Coordinated Transport—
Local Buses**
(serving all points intermediate
between termini)

Exhibit	Carrier	Points Served
12M	No. 1	Paterson to Bogota
12N	No. 22	Wyckoff to Paterson
12O	No. 44	Rochelle Park to Hackensack
12P	No. 86-88	Butler and Pompton Lakes to Paterson (no other intermediate points)
12Q	No. 70-170	Wyckoff to Paterson
12R	No. 68-120	Paterson to Hackensack

[fol. 412] (g) A statement of the traffic transported on trains for each of the last two calendar years and for the part of the current year for which such information is available.

(AVERAGE ~~NUMBER~~ OF DAILY PASSENGERS)

Train	1958	1959	First Nine Months—1960 (Prior to Discontinuance)	Present Number of Passengers (after discontinuance of Jersey City Operation)
908	139	130	104	48
910	237	186	221	126
916	176	169	299	112
919	146	125	136	48
923	300	262	263	120
929	80	85	123	37
	<hr/> 1,078	<hr/> 957	<hr/> 1,146	<hr/> 491

Details of the passenger counts for the two five-day periods commencing respectively on October 17 and October 24, 1960 (after discontinuance of the Jersey City operation) are annexed as Exhibits 13A, 13B, 13C, 13D, 13E and 13F.

(h) Financial results of operating the trains involved during the periods embraced in the statement submitted

pursuant to paragraph (g) above, segregated in the same manner and to the same extent as required by that paragraph:

It has not been possible to segregate the expenses for each train, because the six trains are run in three couplets. The expenses for operation and maintenance therefore have to be applied to the two trains in each couplet.

	<u>1958</u>		
	908/919	910/923	916/929
Total expenses	\$84,039	\$89,533	\$79,190
Total revenues	29,931	59,489	26,528
Net Loss	\$54,108	\$30,044	\$52,662

	<u>1959</u>		
Total expenses	\$68,344	\$71,573	\$66,191
Total revenues	31,334	55,050	31,212
Net loss	\$37,010	\$16,523	\$34,979

	<u>First Nine Months 1960</u>		
Total expenses	\$55,318	\$60,219	\$53,584
Total revenues	23,198	46,784	40,801
Net loss	\$32,120	\$13,435	\$12,783

The details of the foregoing computations are set forth on Exhibits 14A, 14B and 14C hereto.

i. A copy of the carrier's General Balance Sheet statement as of the latest date available; and of its income statements for each of the last two calendar years and for that portion of the current year for which such information is available;

Annexed hereto as Exhibit 7 is the carrier's General Balance Sheet statement as of September 30, 1960. Annexed hereto as Exhibit 6 is the carrier's income statements

for the calendar years 1958 and 1959 and for the first nine months of 1960.

j. Annexed hereto is a certificate by E. H. P. Gilman, Assistant to the President of Susquehanna, that (a) copy of the notice and of the "Statement in relation to proposed discontinuance of train service" have been mailed to the Governor and the Board of Public Utility Commissioners of the State of New Jersey, and to the Governor and the Public Service Commission of the State of New York, the two States in which such trains operate; (b) that such notice has been posted in a conspicuous place in each station, depot, or other facility involved, including each passenger car on trains affected, which certificate includes information of the date or dates on which the notice and statement were mailed and the date or dates on which the notice was posted as aforesaid; and (c) that a copy of the [fol. 114] notice and statement were served on the Assistant Postmaster General, Bureau of Transportation, Washington 25, D. C., and the Railway Labor Executives' Association, Washington 1, D. C.

(k) A map showing the geographical situation of the line over which the trains operate is annexed hereto as Exhibit 15.

New York, Susquehanna and Western Railroad Company, By Ralph E. Sease, President.

[fol. 115] *Duly sworn to by Ralph E. Sease, jurat omitted in printing.*

[fol. 116]

NOV 28 1960
Effective September 21, 1960

General Information

TIME: 12:01 Midnight to 12:00 Noon is indicated by light-faced type.

12:01 Noon to 12:00 Midnight is indicated by heavy-faced type.

HOLIDAYS—The term Holidays referred to in this timetable applies to the following days only: New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, and Christmas Day.

THIS COMPANY IS NOT RESPONSIBLE FOR ERRORS in time tables, inconvenience or damage resulting from delayed trains or failure to make connections; schedules are subject to change without notice.

CHILDREN under five years of age are carried free when accompanied by parent or guardian; five years and under twelve, half fare, twelve years of age and over, full fare.

ADJUSTMENT OF FARES—Should any misunderstanding arise with conductors or agents, pay the fare required, take receipt and communicate with General Freight-Passenger Dept., 160 Market St., Paterson 1, N. J.

LOST TICKETS—Proper care should be taken to guard against the loss of tickets, as Railroads are not responsible for lost tickets.

ARTICLES LOST ON TRAINS—When articles are lost on trains or left in waiting rooms or stations, owners should apply to Lost and Found Bureau, Paterson (B'way) Station, SH. 7-7996, or address General Freight-Passenger Dept., 160 Market St., Paterson 1, N. J., giving full description of the property, stating date of loss and number of train.

Tickets of various forms are issued for convenience of patrons between New York and suburban territory.

ONE-WAY TICKET**THIRTY DAY ROUND TRIP TICKET**

10-TRIP BEARER TICKET. Sold daily to or from New York. Good for three months.

40-TRIP MONTHLY TICKET. Valid to and from New York, also between any two stations within any monthly period, as designated by the purchaser.

COMMUTATION TICKETS may be purchased five (5) days in advance of the initial trip. Same may also be purchased by mail. Remittance in the form of money order or personal check should be made payable to the NY&W R.R. Co. and forwarded to the General Freight-Passenger Dept., 160 Market Street, Paterson 1, N. J. along with the following information: name and address of purchaser, type of ticket, stations transportation is requested for, and desired date for initial trip.

FOR INFORMATION ABOUT TRAINS AND FARES, TELEPHONE—

Port Authority Bus Terminal.... LOngacre 5-7040
Gen. Passenger Office..... MUIlberry 4-8245

R. E. SEASE T. B. DWYER
Pres. & Gen. Mgr. Asst. Traffic Mgr.
160 Market St., Paterson 1, N. J.

NEW YORK SUSQUEHANNA AND WESTERN R. R.

SUBURBAN TIME TABLE

Including service to and from

PORT AUTHORITY BUS TERMINAL

PLATFORM #63

New York City

via the

SUSQUEHANNA SHORT CUT

AVAILABLE ONLY TO HOLDERS
OF A NEW YORK TICKET

The Time Shown in this Folder is

LOCAL TIME

REFERENCE MARKS

* See note Train No. 915.

§ Will operate Good Friday, Election Day, Dec. 23, Dec. 30 instead of Train No. 923.

f—Denotes train stops only on signal.

N.B.—Does not carry baggage.

WESTBOUND				
Miles	FROM NEW YORK	WEEKDAYS MONDAY THROUGH FRIDAY EXCEPT HOLIDAYS		
		919 N.B.	923* N.B.	929 N.B.
	Meter Coach Connection Port Authority Bus Terminal 41st St. & 8th Ave., Platform 68 One Block from Times Square...Lv.	PM	PM	PM
0.0		4 50	5 17	5 30
	SUSQUEHANNA TRANSFER. *	5 10	5 37	5 50
				1 30
6.1	North Bergen.....			
6.5	Babitt.....	5 14		
11.1	Little Ferry.....			5 58
11.8	Ridgefield Park.....	5 29		6 00
13.2	Bogota.....	5 23		6 03
13.9	Hackensack.....	5 25		6 06
14.6	Prospect Avenue.....	5 27		6 07
15.4	Maywood.....	5 30	5 32	6 10
16.1	Rochelle Park.....	5 32	5 35	6 12
18.7	East Paterson.....	5 37		6 17
19.3	Vreeland Avenue (Paterson).....	5 39	6 01	6 19
20.5	Paterson (Broadway).....	5 42	6 04	6 22
21.0	Reveride.....	5 45		6 25
22.8	Hawthorne.....	5 48	6 09	6 28
23.4	North Hawthorne.....	5 51	6 12	6 31
25.2	Midland Park.....	5 55	6 15	6 35
26.4	Wortendyke.....	5 58	6 19	6 38
27.9	Wyckoff.....	6 01	6 22	6 41
29.0	Campgaw.....	6 05	6 26	6 45
30.7	Crystal Lake.....	6 07		6 47
32.0	Oakland.....	6 10	6 31	6 50
33.0	West Oakland.....	6 12		6 52
35.0	Pompton Lakes.....	6 16		6 56
37.9	Butler.....	6 22	6 42	7 02
		PM	PM	PM

EASTBOUND				
	TO NEW YORK	WEEKDAYS MONDAY THROUGH FRIDAY EXCEPT HOLIDAYS		
		908 N.B.	910 N.B.	916 N.B.
		AM	AM	AM
	Butler.....Lv.	6 26	6 48	7 14
	Pompton Lakes.....	6 32	6 53	
	West Oakland.....	6 37	6 57	
	Oakland.....	6 37	7 01	7 25
	Crystal Lake.....	6 40		
	Campgaw.....	6 43	7 07	7 31
	Wyckoff.....	6 48	7 10	7 34
	Wortendyke.....	6 49	7 13	7 37
	Midland Park.....	6 52	7 16	7 40
	North Hawthorne.....	6 56	7 20	7 44
	Hawthorne.....	6 58	7 23	7 46
	Reveride.....	7 00		
	Paterson (Broadway).....	7 04	7 29	7 51
	Vreeland Avenue (Paterson).....	7 07	7 32	7 54
	East Paterson.....	7 09		7 56
	Rochelle Park.....	7 14	7 38	8 01
	Maywood.....	7 17	7 41	8 04
	Prospect Avenue.....	7 19		8 06
	Hackensack.....	7 21	7 44	8 08
	Bogota.....	7 23		8 10
	Ridgefield Park.....	7 26		8 13
	Little Ferry.....	7 34		8 15
	Babitt.....	7 38		
	North Bergen.....	7 38		
	Susquehanna Transfer. *	7 40	7 56	8 23
	Meter Coach Connection Port Authority Bus Terminal 41st Street and Eighth Ave. One Block from Times Square	8 00	8 16	8 43
		AM	AM	AM

Susquehanna Motor-Coaches will be open for occupancy at the Port Authority Bus Terminal 5 minutes prior to departure.

[fol. 118]

EXHIBIT NO. 2 TO STATEMENT

Extracts from Commission Reports and United States Supreme Court Opinion

In *New York, S. & W. R. Co. Common Carrier Application*, 34 M.C.C. 581 (1942), on rehearing 46 M.C.C. 713 (1946), the Commission found "that applicant's motor-vehicle operation between Susquehanna Transfer, North Bergen, N. J., and Manhattan, New York, N. Y. . . . is an intraterminal transfer service incidental to its rail service within the meaning of section 202(c)(2), and as such is exempt from regulation under part II of the act. . . ." 34 M.C.C., at p. 586, 46 M.C.C., at p. 725. Extracts from these reports follow.

34 M.C.C., at p. 583:

"Moreover, an express service only without local stops at points other than North Bergen is proposed. North Bergen is a comparatively small point. An express service serving that point only would be neither natural nor practical except as an 'adjunct of something else' or 'subordinate to the general purpose.' That the proposed operation 'results' from the rail operation is evident. We are convinced that it is 'incidental' to transportation by rail within the meaning of section 202(c)(1)."

.

34 M.C.C., at p. 585:

"It is not unreasonable to consider North Bergen as within applicant's terminal area at 'New York.' Because of the urban character of the territory and density of the population, no definite line can be drawn between the residential sections in which applicant originates commuter traffic and the business district to which such passengers move, but there are 26 stations in the 31.8 miles north of North Bergen, at which applicant supplies commuter service, in contrast to only a few stations in the 5.1 miles between North Bergen and Jersey City, and it is clear that,

south-bound, at North Bergen, applicant has already picked up the bulk of its commuter traffic and is entering its destination or terminal area. . . . We conclude that, at North Bergen, applicant has entered its terminal area at New York, and that the proposed service will be an intraterminal operation."

.

34 M.C.C., at pp. 585-6:

" . . . 'Intraterminal transfer' of passengers, by line-haul carriers thereof, is not uncommon and is within the scope of section 202(c). *Michigan Cab Co., Inc., Common Carrier Application, supra*. Ordinarily, as in the case cited, the transfer is between stations of different carriers as part of an inter-line service, but the statute is not so limited and, in our opinion, applies also to intraterminal transfers between stations of the same carrier. It is true that applicant's upper Manhattan bus station is an off-rail facility, but it was established in aid of, and as an incident of, the rail service, and the transfer of passengers between it and the North Bergen or any other common-carrier station within the same terminal area appears to be within the terms of section 202(c)."

[fol. 119] 46 M.C.C., at pp. 718-19:

"Susquehanna Transfer is located entirely on private property owned by applicant. It is reached only over a private road which is without sidewalks and on which are posted signs reading 'Private Property No Trespassing.' No tickets are sold to or from Susquehanna Transfer, and it is not intended that any passenger should either start or terminate their trips at such point, but rather that its use should be limited solely to the transfer of passengers from train to bus, or bus to train. There is no evidence of record that it has been, or will be, otherwise used by any passenger."

" . . . No passengers are transported by bus over the described route from or to Susquehanna Transfer other than those who have reached that point over applicant's rail line from some point west thereof, or who intend to travel by applicant's rail line to some such point."

.

46 M.C.C., at pp. 723-4:

"As stated, applicant has long served Manhattan from New Jersey points both in freight and passenger rail service. It maintains a passenger station at Chambers Street in Manhattan, and formerly maintained one at Twenty-third Street. By the time its trains reach Susquehanna Transfer they have picked up all of their Manhattan passengers, and the majority of the trains now begin or end their runs at that point. Susquehanna Transfer is due west of, and slightly closer to, midtown Manhattan than it is to the Jersey City ferry slip, and its use eliminates a needless 5-mile additional rail movement to Jersey City. Applicant's rail line into and out of Jersey City runs due north and south parallel to the river, and Susquehanna Transfer is geographically and physically more suitable as the motor transfer point than Jersey City would have been. It is reached by roads and streets leading direct to midtown Manhattan through the tunnel, and the necessary terminal facilities could be readily constructed there and the trains more easily started from east- to west-bound. The straight and [REDACTED] that point was favorable from a safety standpoint, and [REDACTED] use, which is limited to Manhattan passengers, reduces both the rail and bus mileage. . . . We conclude that at Susquehanna Transfer applicant has entered its terminal area at New York in respect of both freight and passenger traffic, and that the described motor service is an intraterminal operation."

This operation was also considered by Division 2 in *Commutation Fares, New York, S. & W. R. Co.*, 280 I.C.C. 31 (1951). The Division said (p. 34):

"The motor-coach service is maintained by the Public Service Interstate Corporation, a subsidiary of the Public Service Company of New Jersey, and the busses are operated under contract with the Susquehanna, by the terms of which the latter controls the number of busses and the running time so that the busses will meet the trains directly. They serve no other passengers except passengers to and

from Susquehanna Transfer. The Times Square terminal is likewise operated by the Public Service Interstate Corporation."

[fol. 120] In *Chicago v. Atchison, T. & S. F. R. Co.*, 357 U.S. 77 (1958), Chicago had enacted an ordinance providing that no license for a transfer vehicle, to transport passengers between railroad stations in Chicago, would issue unless the city commissioner first determined that public convenience and necessity required additional interterminal service. The Court invalidated the ordinance on the ground that Sections 1(4), 3(4) and 15(3) of the Interstate Commerce Act "precluded the City from exercising any veto power over such transfer service when performed by the railroads or by their chosen agents"—(p. 85). The Court said, per Black, J. (pp. 86-7, footnote omitted):

"As we understand these sections they not only authorize the railroads to take all reasonable and proper steps for the transfer of persons and property between their connecting lines, but impose affirmative obligations on them in this respect. . . . Here the railroads have furnished transfer facilities for the heavy flow of traffic between the numerous Chicago terminals for more than a century. It is agreed that transportation by motor vehicle is now the only practical means of moving this traffic from terminal to terminal. We think the transfer service involved is at least authorized, if not actually required, under the Act as a reasonable and proper facility for the interchange of passengers and their baggage between connecting lines.

"Moreover, §302(c) of the Act provides that motor vehicle transportation between terminals, whether performed by a railroad or by an agent or contractor of its choosing, shall be regarded as railroad transportation and shall be subject to the same comprehensive scheme of regulation which applies to such transportation. . . .

"The various provisions set forth above manifest a congressional policy to provide for the smooth, continuous and efficient flow of railroad traffic from State to State subject to federal regulation. In our view it would be inconsistent with this policy if local authorities retained the power to

decide whether the railroads or their agents could engage in the interterminal transfer of interstate passengers. We believe the Act authorizes the railroads to engage in this transfer operation themselves or to select such agents as they see fit for that purpose without leave from local authorities."

[fol. 121]

EXHIBIT NO. 3 TO STATEMENT

NEW YORK, SUSQUEHANNA AND
WESTERN RAILROAD COMPANY

Actual Out-Of-Pocket Passenger Losses, Total Freight Earnings and Percentages of the Latter to Absorb the Passenger losses.

Year	I.C.C. Formula	PASSENGER DEFICIT.			Percent of A to B.
		Out-of-Pocket Losses	Freight Earnings		
1959	\$629,981	\$269,767	\$185,045	Deficit	
1958	815,928	307,979	71,316	"	
1957	911,643	336,017	358,900		93.62
1956	869,970	243,976	482,627		50.55
1955	766,279	221,015	540,124		40.92
1954	918,284	247,299	776,919		31.83
1953	802,303	257,741	796,694		32.35

Auditor of Revenue & Disbursements
Paterson—New Jersey
December 27, 1960

[fol. 122]

EXHIBIT NO. 4 TO STATEMENT

Extracts from Report of Division 4 in Finance Docket No. 20266, *New York, Susquehanna & Western Railroad Company Abandonment of Operation, Jersey City, N. J.* (decided August 8, 1960), pp. 13-14

"The burden that continued operation of the trains in question would impose upon the carrier's interstate operations or upon interstate commerce must be balanced against the inconvenience or damage that abandonment of service would impose upon the communities affected. But that burden must also be considered in relationship to the financial status of the carrier, one of the essential factors considered in abandonment proceedings. Not only has Susquehanna's operation in the past been shown to have been at a loss but its continued operation in the future would severely tax the carrier. On the basis of the same evidence as was adduced in this proceeding, the State commission and the Appellate Division of the New Jersey Superior Court concluded . . . that the railroad did not have sufficient overall income safely to carry its passenger deficit, [and] that "extraordinary consideration" should be given to the financial aspects of its operations.' *Susquehanna etc., Assn. v. Bd. of Pub. Util. Comm'rs.*, 55 N. J. Super. 377, 151 A. 2d 9 (App. Div. 1959).

"The Susquehanna in May 1953 emerged from reorganization under section 77 of the Bankruptcy Act which had lasted for sixteen years. *In re New York, S. & W. Co. Reorganization*, 261 I.C.C. 101, 124. In 1956 its railroad operations failed to earn its reduced fixed charges by \$30,000; in 1957 by \$146,877, and in 1958 by \$531,694. As of June 30, 1958, it showed a working capital deficit of \$248,353. And, it has recently found it necessary to borrow \$300,000 on a government guaranteed loan to reimburse its treasury for expenditures made for additions and betterments. See Finance Docket No. 20840, *New York, S. & W. R. Co. Loan Guaranty*, decided December 23, 1959. The operation of the system as a whole, including both freight and passenger service, resulted in a loss of \$621,676

in net income after charges in 1958 and other substantial losses in previous years."

[fol. 123]

EXHIBIT NO. 5 TO STATEMENT

Extracts from opinion in *Susquehanna, etc., Assn. v. Bd. of Pub. Util. Comm'rs.*, 55 N. J. Super, 377, 151 A. 2d 9 (App. Div. 1959)

55 N. J. Super., at pp. 389-90, 151 A. 2d, at pp. 15-16:

"The Board was unquestionably aware that Susquehanna's present fixed charges apply to a drastically reduced capitalization approved by the Interstate Commerce Commission, the bankruptcy court, and the United States Court of Appeals as 'compatible with the public interest,' in a reorganization proceeding under section 77 of the Bankruptcy Act. This proceeding had lasted some 16 years, the railroad emerging in May 1953. See 11 U. S. C., §205(b) and (d); *In re New York, Susquehanna & Western R. Co.*, 103 F. Supp. 981 (D.C.D.N.J. 1951), affirmed on opinion 196 F. 2d 216 (3 Cir. 1952). The reorganization resulted, among other things, in reducing capitalization from \$42 millions to \$16 millions, and the recasting of first mortgage bonds and junior bonds. Fixed interest debt was reduced from \$12 million to \$5 million. The Interstate Commerce Commission had found that the reorganized company's earnings available for interest and other corporate purposes in a normal year might be expected to range between \$700,000 and \$775,000. The exhibits show that Susquehanna's actual earnings available for fixed charges during the four years following its reorganization steadily declined, so that the rate of return on the reduced capitalization fell from 3.38% in 1953 to 0.14% in 1957. The financial tables make clear that since the reorganization Susquehanna has not earned anything like what the Commission expected it to earn, largely as a result of its out-of-pocket losses in the passenger service."

55 N. J. Super., at pp. 401-3, 151 A. 2d, at pp. 22-3:

"We deal with the suggestion made on behalf of the Board by the Attorney General that 'it is easy to overstate the railroad's financial difficulties.' This lies in the face of the Board's specific finding, already mentioned, that Susquehanna 'does not have sufficient overall income to safely carry the deficit of the passenger service and that extraordinary consideration should be given to the financial aspects of its operation.'

"The Attorney General states that 'No company is entitled to a guaranteed rate of return.' However that may be, Susquehanna has since its reorganization earned only between 0.14% (in 1957) and 3.38% (in 1953 when it emerged from reorganization) on the greatly reduced capitalization which the Interstate Commerce Commission and the United States Court of Appeals found to be compatible with the public interest. This should be contrasted with rates of return well over 5% which the Board found to be within the range of reasonableness for electric and telephone companies, which findings were approved by the Supreme Court. See *In re N. J. Power & Light Co.*, 15 N. J. 498, 534 (1952); *In re N. J. Power & Light Co.*, 15 N. J. 82, 85 (1954); *N. J. Bell Tel. Co. v. Board of Public Utility Comm'rs*, 12 N. J. 568, 600-601 (1953). As Susquehanna points out, these industries have earnings more stable than [fol. 124] in the case of railroads. Susquehanna's return on capitalization is not such as, in the language of *Public Service Coordinated Transport v. State*, 5 N. J. 196, 225 (1950) 'should be sufficient to encourage good management and furnish a reward for efficiency, to enable the utility, under efficient and economical operation, to maintain and support its credit; and to enable it to raise money necessary for the proper discharge of its public duties.'

"We have heretofore discussed certain aspects of Susquehanna's finances. Examination of the financial tables shows that continuing out-of-pocket losses from passenger service have had to be taken up by freight earnings. These earnings have precipitously declined since 1950 (from \$1,148,764 to \$358,900), in large part because of the loss of

freight business when the Ford Motor Company moved from Edgewater to Mahwah, N. J. As a result, the percentage of freight earnings required to absorb the out-of-pocket passenger losses has, as noted above, increased—from 32% in 1952 through 1954, to 41% in 1955, 51% in 1956 and 94% in 1957 (round figures). The 'lucrative freight business' which was present in *Pennsylvania R. R. Co. v. Board of Public Utility Comm'rs.*, above, 48 N. J. Super., at page 226, just does not exist here to offset passenger revenue losses.

"The Board was entirely correct in taking into consideration the financial figures relating to the Susquehanna operation. As noted in our discussion under III above, the Board could not, in its concern for local users, ignore the interest of the general public in the continued operation of the railroad, or shut its eyes to the fact that continuing passenger service deficits might jeopardize the entire operation. See *In re Central R. R. Co. of N. J.*, above, 41 N. J. Super., at pages 501-502, and the dissenting opinion in *In re New Jersey & New York R. R. Co.*, above, 12 N. J., at pages 290-291."

NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY

INCOME STATEMENT FOR THE CALENDAR YEARS 1958, 1959 AND NINE MONTHS OF 1960.

	1958	1959	9 Months 1960
OPERATING REVENUES:			
Freight	\$3,778,014	\$3,648,778	\$2,755,632
Passenger	308,772	200,096	116,559
All Other	182,753	105,511	247,137
Total	\$4,269,539	\$3,954,385	\$3,119,328
OPERATING EXPENSES:			
Maintenance of Way & Structures	\$ 174,417	\$ 155,128	\$ 378,096
Maintenance of Equipment	653,624	613,841	490,221
Traffic	77,672	204,697	61,702
Transportation	2,172,421	2,049,993	1,372,115
General	122,413	221,722	221,258
Total	\$3,100,547	\$3,045,381	\$2,523,392
Net Revenue From Railway Operations	\$ 1,168,992	\$ 908,999	\$ 595,936
Railway Tax Accruals	368,021	393,899	312,368
Railway Operating Income	75,290	9,122	183,568
Equipment Funds - Net Debit	480,857	507,352	367,490
Joint Facility Funds - Net Credit	11,562	12,113	11,278
Net Railway Operating Income	\$ 126,129	\$ 128,814	\$ 273,346
OTHER INCOME:			
Income from Lease of Road & Equipment	\$ 5,110	\$ 5,126	\$ 1,261
Miscellaneous Rent Income	26,860	26,731	23,393
Income from Non-operating Property	1,829	3,388	4,466
Interest Income	2,385	2,185	1,990
Miscellaneous Income	8,013	2,132	253
Total Other Income	\$ 34,197	\$ 39,562	\$ 11,763
TOTAL INCOME	\$ 160,326	\$ 168,376	\$ 285,112
MISCELLANEOUS DEDUCTIONS FROM INCOME:			
Miscellaneous Taxes	\$ 111	\$ 25	\$ 25
Miscellaneous Tax Accruals	4,215	4,357	3,375
Miscellaneous Income Charges	1,657	1,123	1,006
Total Miscellaneous Deductions	\$ 5,983	\$ 5,505	\$ 4,606
Income Available for Fixed Charge	\$ 154,343	\$ 162,871	\$ 280,506

OPERATING EXPENSES:

Maintenance of Way & Structures
Maintenance of Equipment
Traffic
Transportation
General
Total

Net Revenue From Railway Operations
Railway Tax Accruals

Railway Operating Income
Equipment Rents - Net Debit
Joint Facility Rents - Net Credit

Net Railway Operating Income

OTHER INCOME:

Income from Lease of Road & Equipment
Miscellaneous Rent Income
Income from Non-operating Property
Interest Income
Miscellaneous Income
Total Other Income

TOTAL INCOME

MISCELLANEOUS DEDUCTIONS FROM INCOME:

Miscellaneous Rents
Miscellaneous Tax Accruals
Miscellaneous Income Charges
Total Miscellaneous Deductions

Income Available for Fixed Charges

FIXED CHARGES:

Cost for Leased Roads & Equipment
Interest on Funded Debt:
(a) Fixed charges not in default
(b) Interest in default
Amortization of discount on Funded Debt
Total Fixed Charges
Income after Fixed Charges

OTHER DEDUCTIONS:

Interest on Funded Debt:
(c) Contingent Interest

Net Income After Fixed Charges & Other Deductions

Denotes RED figure

Accounting Department
Paterson - New Jersey
November 15, 1960

\$ 174,617	\$ 165,121	\$ 370,096
653,654	643,841	150,221
77,672	104,677	61,702
2,172,621	2,069,993	1,372,115
130,613	301,729	271,984
<u>13,709,237</u>	<u>63,805,304</u>	<u>12,505,058</u>
\$ 144,311	\$ 102,900	\$ 153,521
368,021	393,899	302,388
76,290	9,121	151,193
180,857	507,352	307,190
11,5424	12,113	11,278
\$ 116,1294	\$ 105,8184	\$ 225,0194
\$ 5,110	\$ 5,126	\$ 1,262
26,549	26,731	23,393
1,829	3,326	1,168
2,385	1,185	1,990
8,913	2,139	953
<u>11,706</u>	<u>30,809</u>	<u>1,853</u>
\$ 371,3134	\$ 147,0094	\$ 190,3664
\$ 111	\$ 25	\$ 25
1,115	1,357	3,375
<u>1,657</u>	<u>1,421</u>	<u>1,006</u>
\$ 7,952	\$ 7,800	\$ 10,206
\$ 379,2954	\$ 151,8124	\$ 200,7724
\$ 165	\$ 370	\$ 959
151,974	133,172	103,615
-	-	-
<u>152,399</u>	<u>133,542</u>	<u>104,574</u>
\$ 531,6944	\$ 508,3544	\$ 305,3164
\$ 89,982	-	-
\$ 621,6764	\$ 508,3544	\$ 305,3164

[fol. 125]

EXHIBIT NO. 6 TO STATEMENT

N.J., 7:40 AM, for Period October 17th to October
21st, and October 24th to October 28th, Inclusive, 1960.

From	To	October										Total Passengers	Average Per Day
		17	18	19	20	21	24	25	26	27	28		
Butler	Susq. Tfr.	0	0	0	0	0	0	0	0	0	0	0	0
Pompton Lakes		0	0	0	0	0	0	0	0	0	0	0	0
Oakland		2	2	2	2	1	1	1	2	1	2	16	1.6
Crystal Lake		1	1	1	1	1	1	1	1	1	1	10	1.0
Campgaw		1	1	1	1	1	1	1	1	1	1	10	1.0
Wyckoff		1	1	1	1	1	0	0	0	0	0	5	.5
Wortendyke		0	0	1	1	0	0	0	0	0	0	2	.2
Midland Park		2	0	0	0	0	0	0	0	0	0	2	.2
No. Hawthorne		0	0	0	0	0	1	1	0	1	1	4	.4
Hawthorne		6	3	5	6	3	2	4	2	5	3	39	3.9
Riverside		0	0	0	0	0	0	0	0	0	0	0	0
Paterson B'way		9	12	8	9	8	10	9	8	11	10	94	9.4
Vreeland Ave.		5	3	2	3	4	4	4	3	4	2	34	3.4
East Paterson		3	2	2	2	3	3	2	3	2	3	25	2.5
Passaic Jct.		0	0	0	0	0	0	0	0	0	0	0	0
Rochelle Park		7	6	5	6	8	6	6	6	4	5	59	5.9
Maywood		8	6	6	9	7	7	5	7	7	7	69	6.9
Prospect Ave.		0	0	1	1	0	0	0	0	0	0	2	.2
Hackensack		1	1	3	0	0	1	1	1	0	0	8	.8
Bogota		1	1	1	1	1	1	1	1	1	1	10	1.0
Ridgefield Pk		0	1	1	1	1	0	1	1	1	1	8	.8
Little Ferry		0	0	0	0	0	0	0	0	0	0	0	0
Babbitt		0	0	0	0	0	0	0	0	0	0	0	0
No. Bergen		0	0	0	0	0	0	0	0	0	0	0	0
Total		47	40	40	44	39	38	37	36	39	37	397	39.7
Paterson, N.J. and East		34	32	29	32	32	32	29	30	30	29	309	30.9
Hawthorne and No. Hawthorne, N.J.		6	3	5	6	3	3	5	2	6	4	43	4.3
Midland Park, N.J. and West		7	5	6	6	4	3	3	4	3	4	45	4.5
Intrastate Passengers		6	7	8	11	11	7	7	8	7	8	80	8.0
Total All Passengers		53	47	48	55	50	45	44	44	46	45	477	47.7

Daily except Saturday, Sunday and Holidays

Office of Revenue & Disbursements
Paterson - New Jersey
Dec. 5, 1960

[Col. 132]

EXHIBIT NO. 13A TO STATEMENT

132

[fol. 126]

EXHIBIT NO. 8 TO STATEMENT

Extracts from Report of Division 4 in Finance Docket No. 20266, *New York, Susquehanna & Western Railroad Company Abandonment of Operation, Jersey City, N. J.* (decided August 8, 1960), pp. 11-12

"Erie contends that the \$30,000 annual rental is grossly inadequate and such payments are being treated as payments on account. Under such circumstances any rental determined by this Commission to be just and reasonable compensation would be retroactive to December 15, 1958, when Susquehanna commenced its 'on account' rental payments. While Susquehanna no longer has use of the Erie ferry, which it had at the time it paid rental of \$100,000 annually, it does not necessarily follow that a rental now approved by us would be less than that amount. If we take into account \$100,000 as the expense of operating the line we arrive at a *loss*, based on the examiner's computations, of \$38,000. And if the computation is made on the assumption that we would approve the \$197,000 requested by Erie we reach an operational *loss* of \$135,000 (italics in original).

"Erie has divided the trackage and terminal section, from milepost 0.00 to milepost 2.61, into five zones. Zone 1, from milepost 0.00 to 0.59, embracing the terminal facilities, is used exclusively by Susquehanna. Zones 2 through 5, from milepost 0.59 to milepost 2.61, inclusive, are used jointly by Erie and Susquehanna, with the percentage of use by the latter ranging from 5.80 to 15.79 percent.

"With respect to Zone 1, Erie apportions 100 percent of use, or the entire cost of operation to Susquehanna. The valuation figures used in the formula were prepared by Erie in accordance with the rules, methods and principles established by the Commission's Bureau of Valuation.

"The depreciated value of the property in Zone 1 is \$1,144,717. A 6-percent return of investment thereon would be \$68,863. Adding real estate taxes for the year 1958 of \$18,347, annual depreciation of \$8,615, and annual mainte-

nance expense of \$26,303, a rental of \$122,128 results for the terminal facilities alone. This allows nothing to Erie for its cost of operating the zone nor for Susquehanna's percentage use of the other zones. Using the examiner's computations and applying the amount of \$122,128 as expense assigned to the line, Susquehanna shows a *loss* of \$59,681 from its operation in Zone 1, alone.

"If we allow nothing to Erie for return of investment and on a user basis apportion to Susquehanna real estate taxes \$20,358, depreciation expense \$10,228, maintenance expense \$30,142, and cost of operation \$31,552, a total expense of \$92,250 would be assigned and result in an operating loss of \$29,803 in the zone."

[fol. 127]

EXHIBIT NO. 9 TO STATEMENT

NEW YORK, SUSQUEHANNA AND WESTERN
RAILROAD COMPANY

Statement of Revenues and Selected Items of Expense in Connection
with the Operation of Trains 908 and 919, 910 and 923 and 916 and
929 for Year 1960 based on Present Operation.

(A)—*Expenses:*

	Trains 908 & 919	Trains 910 & 923	Trains 916 & 929	Total
Wages (Train & Engine Crews)	\$33,473	\$33,666	\$33,276	\$100,415
Vacation Allowance	1,931	1,943	1,920	5,794
Payroll Taxes	2,016	2,016	2,016	6,048
Repairs to Locomotives	12,158	12,158	12,158	36,474
Repairs to Passenger Cars	1,022	1,022	1,022	3,066
Fuel for Locomotives	2,177	2,177	2,177	6,531
Train Supplies and Expenses	2,092	2,092	2,092	6,276
Depreciation—Loco- motives & Cars	5,886	5,886	5,886	17,658
	\$60,755	\$60,960	\$60,547	\$182,262

(B)—*Revenues:* \$12,578 \$33,059 \$19,411 \$ 65,048

(C)—*Loss:* \$48,177 \$27,901 \$41,136 \$117,214

Note: Expenses are based on actual present expense computed
in manner set forth in Ex. 14.

Revenues are based on actual revenue collected in two
five day periods commencing respectively on October
17th and October 24th, projected to annual basis.

Office of Revenue & Disbursements
Paterson—New Jersey
December 27, 1960

N.J. 1:50 PM, for period October 17th to October
21st, and October 24th to October 28th, inclusive, 1960.

From	To	OCTOBER										Total Passengers	Average Per Day
		17	18	19	20	21	24	25	26	27	28		
Butler	Susq. Tfr.	0	0	0	0	0	0	0	0	0	0	0	0
Pompton Lakes		0	0	0	0	0	0	0	0	0	0	0	0
Oakland		7	4	4	6	4	6	7	6	6	4	54	5.4
Crystal Lake		0	0	0	0	0	0	0	0	0	0	0	0
Campgaw		0	0	0	0	0	0	0	0	0	0	0	0
Wyckoff		16	14	16	15	14	15	15	15	16	14	150	15.0
Wortendyke		3	3	2	3	2	4	4	3	5	4	33	3.3
Midland Park		8	7	3	8	6	6	5	4	5	5	57	5.7
No. Hawthorne		5	9	11	5	5	7	8	8	5	6	69	6.9
Hawthorne		20	24	18	20	14	24	21	23	21	20	205	20.5
Riverside		0	0	0	0	0	0	0	0	0	0	0	0
Paterson B'way		21	25	21	26	25	22	24	22	24	15	225	22.5
Vreeland Ave.		15	15	14	11	10	17	15	12	12	13	134	13.4
East Paterson		0	0	0	0	0	0	0	0	0	0	0	0
Passaic Jct.		0	0	0	0	0	0	0	0	0	0	0	0
Rochelle Park		17	12	11	14	13	11	11	9	14	12	124	12.4
Maywood		18	14	15	21	17	9	12	13	13	12	144	14.4
Prospect Avenue		0	0	0	0	0	0	0	0	0	0	0	0
Hackensack		1	0	0	1	1	0	2	0	1	0	6	.6
Bogota		0	0	0	0	0	0	0	0	0	0	0	0
Ridgefield Park		0	0	0	0	0	0	0	0	0	0	0	0
Little Ferry		0	0	0	0	0	0	0	0	0	0	0	0
Babbitt		0	0	0	0	0	0	0	0	0	0	0	0
North Bergen		0	0	0	0	0	0	0	0	0	0	0	0
Total		131	127	115	111	111	121	124	122	122	122	1,201	120.1
		130					115				105		
Paterson, N.J. and East		72	66	61	73	66	59	64	56	64	52	633	63.3
Hawthorne & No.		25	33	29	25	19	31	29	31	26	26	274	27.4
Hawthorne, N.J. & West		34	28	25	32	26	31	31	28	32	27	294	29.4
Intrastate Passengers		4	5	7	7	6	8	6	5	10	5	63	6.3
Total All Passengers		135	132	122	137	117	129	120	110	110	110	1,264	126.4
		130					132						

Daily except Saturday, Sunday and Holidays

EXHIBIT NO. 13B TO STATEMENT

133

Other Common Carrier Bus Service Available at Oakland,
Franklin Lakes and Wyckoff

Eastbound

<u>Lv.</u>	<u>No. of Pass.</u>	<u>908</u>	<u>Hudson</u>	<u>No. of Pass.</u>	<u>910</u>	<u>Hudson</u>	<u>No. of Pass.</u>	<u>916</u>	<u>Hudson</u>
Oakland	1.6	6:37am	7:00am	5.4	7:01am	7:15am	2.4	7:25am	7:30am
Crystal Lake	1.0	6:40	7:03	0	--	7:18	0	7:28	7:33
Campgaw	1.0	6:43	7:05	0	7:07	7:20	3.8	7:31	7:35
Wyckoff	.5	6:46	7:11	15.0	7:10	7:26	8.8	7:34	7:41
Arr. PABT		8:00	8:05		8:16	8:20		8:43	8:35

Westbound

<u>Lv.</u>	<u>No. of Pass.</u>	<u>919</u>	<u>Hudson</u>	<u>No. of Pass.</u>	<u>923</u>	<u>Hudson</u>	<u>No. of Pass.</u>	<u>929</u>	<u>Hudson</u>
PABT		4:50pm	5:00pm		5:17pm	5:15pm		5:30pm	5:30pm
Arr. Wyckoff	2.6	6:01	5:52	19.2	6:22	6:07	1.5	6:41	6:21
Campgaw	1.6	6:05	5:56	1.2	6:26	6:11	.6	6:45	6:25
Crystal Lake	0	6:07	6:00	0	--	6:15	.9	6:47	6:29
Oakland	2.3	6:10	6:05	4.6	6:31	6:20	1.3	6:50	6:37

Other Common Carrier Bus Service Available at
Wortendyke and Midland Park

Eastbound

<u>LY.</u>	<u>No. of Pass.</u>	<u>908</u>	<u>Inter- City</u>	<u>No. of Pass.</u>	<u>910</u>	<u>Inter- City</u>	<u>No. of Pass.</u>	<u>916</u>	<u>Inter- City</u>
Wortendyke	.2	6:49am	6:50am	3.3	7:13am	7:10am	1.2	7:37am	7:35am
Midland Park	.2	6:52	6:55	5.7	7:16	7:15	3.6	7:40	7:40
ARR. PABT		8:00	7:50		8:16	8:10		8:43	8:35

Westbound

<u>LY.</u>	<u>No. of Pass.</u>	<u>919</u>	<u>Inter- City</u>	<u>No. of Pass.</u>	<u>923</u>	<u>Inter- City</u>	<u>No. of Pass.</u>	<u>929</u>	<u>Inter- City</u>
PABT.		4:50pm	5:00pm		5:17pm	5:20pm		5:30pm	5:35pm
ARR.									
Midland Park	.7	5:55	5:52	4.8	6:16	6:09	1.5	6:35	6:24
Wortendyke	1.6	5:58	5:57	2.7	6:19	6:14	.3	6:38	6:29

[fol. 130]

EXHIBIT No. 11C TO STATEMENT

Other Common Carrier Service Available at Hawthorne,
Paterson and East Paterson

Eastbound													
Lv.	No. of Pass.	908 am	Man- hattan am	Erie am	No. of Pass.	910 am	Man- hattan am	Erie am	No. of Pass.	916 am	Man- hattan am	Erie am	Erie am
Hawthorne				7:06				7:23					8:06
N. Hawthorne	.4	6:56			6.9	7:20			6.5	7:44			
Hawthorne	3.9	6:58			20.5	7:23			10.7	7:46			
Paterson				7:12				7:28				8:00	8:12
Broadway	9.4	7:04	7:20		22.5	7:29	7:29		4.1	7:51	7:54		
Vreeland Av.	3.4	7:07	7:25		13.4	7:32	7:33		12.2	7:54	7:58		
E. Paterson	2.5	7:09	7:30		0	--	7:37		3.4	7:56	8:02		
Arr. PABT		8:00	8:00			8:16	8:07			8:43	8:37		
Barclay St.				8:04				8:16				8:48	9:04

<u>Westbound</u>													
<u>Lv.</u>	<u>No. of Pass.</u>	<u>919 pm</u>	<u>Man- hattan pm</u>	<u>Erie pm</u>	<u>No. of Pass.</u>	<u>923 pm</u>	<u>Man- hattan pm</u>	<u>Inter- City pm</u>	<u>Erie pm</u>	<u>No. of Pass.</u>	<u>929 pm</u>	<u>Man- hattan pm</u>	<u>Erie pm</u>
PABT Barclay St.		4:50	4:50	4:58		5:17	5:10	5:15	5:25		5:30	5:30	5:25
Acc. E. Paterson	0	5:37	5:28		0	--	--	--		.8	6:17	6:18	
Paterson				5:44					6:15				6:15
Vreeland Av.	4.0	5:39	5:32		9.0	6:01	6:02			3.7	6:19	6:22	
Broadway	2.4	5:42	5:36		15.8	6:04	6:06	6:00		6.6	6:22	6:26	
Hawthorne				5:50					6:20				6:20
Hawthorne	5.7	5:48			21.8	6:09				3.5	6:28		
N. Hawthorne	1.5	5:51			8.8	6:12				1.6	6:30		

21st, and October 24th to October 28th inclusive, 1960.

From	To	OCTOBER										Total Psgs	Average Psgs Per Day
		17	18	19	20	21	24	25	26	27	28		
Butler	Susq. Tfr.	0	0	0	0	0	0	0	0	0	0	0	0
Pompton Lakes		0	0	0	0	0	0	0	0	0	0	0	0
Oakland		2	1	2	2	1	1	3	2	4	6	24	2.4
Crystal Lake		0	0	0	0	0	0	0	0	0	0	0	0
Campgaw		3	6	4	4	4	4	4	3	4	2	38	3.8
Wyckoff		9	9	8	6	10	7	9	10	8	12	88	8.8
Wortendyke		1	1	1	1	0	2	2	1	2	1	12	1.2
Midland Park		2	3	3	1	2	4	5	9	4	3	36	3.6
No. Hawthorne		6	5	6	8	9	8	5	6	6	6	65	6.5
Hawthorne		11	12	10	11	12	9	12	9	10	11	107	10.7
Riverside		0	0	0	0	0	0	0	0	0	0	0	0
Paterson B'way		4	2	2	5	3	4	4	6	4	7	41	4.1
Vreeland Avenue		10	12	14	11	14	12	13	14	11	11	122	12.2
East Paterson		4	4	4	3	3	3	2	3	4	4	34	3.4
Passaic Jct.		0	0	0	0	0	0	0	0	0	0	0	0
Rochelle Park		12	15	16	14	13	9	13	15	12	13	132	13.2
Maywood		16	16	16	13	15	16	13	12	14	11	142	14.2
Prospect Avenue		3	3	3	1	2	3	1	1	0	3	20	2.0
Hackensack		3	3	3	3	2	3	3	1	2	4	27	2.7
Bogota		1	2	5	2	2	1	2	2	2	0	19	1.9
Ridgefield Park		0	1	0	1	0	0	0	0	0	0	2	.2
Little Ferry		2	0	0	0	1	0	0	0	0	0	3	.3
Babbitt		0	0	0	0	0	0	0	0	0	0	0	0
North Bergen		0	0	0	0	0	0	0	0	0	0	0	0
Total		89	95	97	86	93	86	91	94	87	94	912	91.2
Paterson, N.J. and East		55	58	63	53	55	51	51	54	49	53	542	54.2
Hawthorne and No. Hawthorne, N.J.		17	17	16	19	21	17	17	15	16	17	172	17.2
Midland Park and West		17	20	18	14	17	18	23	25	22	24	198	19.8
Intrastate Passengers		21	17	20	23	22	22	27	22	18	21	213	21.3
Total All Passengers		110	117	115	109	115	108	116	115	105	115	1,125	112.5

Daily except Saturday, Sunday and Holidays

Office of Revenue and Disbursements
Paterson - New Jersey
Dec. 5, 1960

[fol. 134]

EXHIBIT No. 130 TO STATEMENT

134

Other Common Carrier Service Available at
Rockelle Rock and Maywood

East-bound

<u>Ly.</u>	<u>No. of Pass.</u>	<u>908 am</u>	<u>West- Wood am</u>	<u>Inter- City am</u>	<u>No. of Pass.</u>	<u>910 am</u>	<u>West- Wood am</u>	<u>Inter- City am</u>	<u>No. of Pass.</u>	<u>916 am</u>	<u>West- Wood am</u>	<u>Inter- City am</u>
Rockelle Pk.	5.9	7:14	7:15	7:19	12.8	7:38	7:30	7:37	13.2	8:01	7:50	8:04
Maywood	6.9	7:17	7:20	7:22	14.4	7:41	7:35	7:40	14.2	8:04	7:55	8:07
ACT. PABT		8:00	8:01	8:07		8:16	8:16	8:25		8:43	8:36	8:52

Westbound

<u>Ly.</u>	<u>No. of Pass.</u>	<u>919 pm</u>	<u>Inter- City pm</u>	<u>No. of Pass.</u>	<u>923 pm</u>	<u>West- Wood pm</u>	<u>No. of Pass.</u>	<u>929 pm</u>	<u>Inter- City pm</u>
PABT		4:50	5:05		5:17	5:10		5:30	5:25
ACT.									
Maywood	3.4	5:30	5:45	16.0	5:52	5:53	5.0	6:10	6:10
Rockelle Pk.	4.3	5:32	5:48	14.7	5:55	5:58	5.2	6:12	6:13

NEWYORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY

Statement Showing the Total Number of Revenue Passengers "On and Off", and the Average Per Day Using Train No.908, Departing Butler, N.J., 6:26 AM, Arriving Susquehanna Transfer, N.J., 7:40 AM, for Period October 17th to October 21st, and October 24th to October 28th, Inclusive, 1960.

From	To	October										Total Passengers	Average Per Day
		17	18	19	20	21	24	25	26	27	28		
Butler	Susq. Tfr.	0	0	0	0	0	0	0	0	0	0	0	0
Pompton Lakes		0	0	0	0	0	0	0	0	0	0	0	0
Oakland		2	2	2	2	1	1	1	2	1	2	16	1.6
Crystal Lake		1	1	1	1	1	1	1	1	1	1	10	1.0
Campgaw		1	1	1	1	1	1	1	1	1	1	10	1.0
Wyckoff		1	1	1	1	1	0	0	0	0	0	5	.5
Wortendyke		0	0	1	1	0	0	0	0	0	0	2	.2
Midland Park		2	0	0	0	0	0	0	0	0	0	2	.2
No. Hawthorne		0	0	0	0	0	1	1	0	1	1	4	.4
Hawthorne		6	3	5	6	3	2	4	2	5	3	39	3.9
Riverside		0	0	0	0	0	0	0	0	0	0	0	0
Paterson B'way		9	12	8	9	8	10	9	8	11	10	94	9.4
Vreeland Ave.		5	3	2	3	4	4	4	3	4	2	34	3.4
East Paterson		3	2	2	2	3	3	2	3	2	3	25	2.5
Passaic Jct...		0	0	0	0	0	0	0	0	0	0	0	0
Rochelle Park		7	6	5	6	8	6	6	6	4	5	59	5.9
Maywood		8	6	6	9	7	7	5	7	7	7	69	6.9
Prospect Ave.		0	0	1	1	0	0	0	0	0	0	2	.2
Hackensack		1	1	3	0	0	1	1	1	0	0	8	.8
Bogota		1	1	1	1	1	1	1	1	1	1	10	1.0
Ridgefield Pk		0	1	1	1	1	0	1	1	1	1	8	.8
Little Ferry		0	0	0	0	0	0	0	0	0	0	0	0
Babbitt		0	0	0	0	0	0	0	0	0	0	0	0
No. Bergen		0	0	0	0	0	0	0	0	0	0	0	0
Total		47	40	40	44	39	38	37	36	39	37	397	39.7

Paterson, N.J.
and East
Hawthorne and
No. Hawthorne, N.J.
Midland Park, N.J.
and West
Intrastate
Passengers

34	32	29	32	32	32	29	30	30	29
6	3	5	6	3	3	5	2	6	4
7	5	6	6	4	3	3	4	3	4
6	7	8	11	11	7	7	8	7	8

309
43
45
80

30.9
4.3
4.5
8.0

Exhibit No.

(Vol. 132)

NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY.

Statement Showing the Total Number of Revenue Passengers "On and Off", and the Average Per Day Using Train 910, Departing Butler, N.J. 6:48 AM, Arriving Susquehanna Transfer, N.J. 7:56 PM, for Period October 17th to October 21st, and October 24th to October 28th, inclusive, 1960.

From	To	OCTOBER										Total Passengers	Average Per Day
		17	18	19	20	21	24	25	26	27	28		
Butler	Susq. Tfr.	0	0	0	0	0	0	0	0	0	0	0	0
Pompton Lakes		0	0	0	0	0	0	0	0	0	0	0	0
Oakland		7	4	4	6	4	6	7	6	6	4	54	5.4
Crystal Lake		0	0	0	0	0	0	0	0	0	0	0	0
Campgaw		0	0	0	0	0	0	0	0	0	0	0	0
Wyckoff		16	14	16	15	14	15	15	15	16	14	150	15.0
Wortendyke		3	3	2	3	2	4	4	3	5	4	33	3.3
Midland Park		8	7	3	8	6	6	5	4	5	5	57	5.7
No. Hawthorne		5	9	11	5	5	7	8	8	5	6	69	6.9
Hawthorne		20	24	18	20	14	24	21	23	21	20	205	20.5
Riverside		0	0	0	0	0	0	0	0	0	0	0	0
Paterson B'way		21	25	21	26	25	22	24	22	24	15	225	22.5
Vreeland Ave.		15	15	14	11	10	17	15	12	12	13	134	13.4
East Paterson		0	0	0	0	0	0	0	0	0	0	0	0
Passaic Jct.		0	0	0	0	0	0	0	0	0	0	0	0
Rochelle Park		17	12	11	14	13	11	11	9	14	12	124	12.4
Maywood		18	14	15	21	17	9	12	13	13	12	144	14.4
Prospect Avenue		0	0	0	0	0	0	0	0	0	0	0	0
Hackensack		1	0	0	1	1	0	2	0	1	0	6	.6
Bogota		0	0	0	0	0	0	0	0	0	0	0	0
Ridgefield Park		0	0	0	0	0	0	0	0	0	0	0	0
Little Ferry		0	0	0	0	0	0	0	0	0	0	0	0
Babbitt		0	0	0	0	0	0	0	0	0	0	0	0
North Bergen		0	0	0	0	0	0	0	0	0	0	0	0
Total		131	127	115	111	111	121	124	115	122	105	1,201	120.1
Paterson, N.J. and East Hawthorne & No. Hawthorne, N.J. Midland Park, N.J. & West Intrastate Passengers		72	66	61	73	66	59	64	56	64	52	633	63.3
		25	33	29	25	19	31	29	31	26	26	274	27.4
		34	28	25	32	26	31	31	28	32	27	294	29.4
		4	5	7	7	6	8	6	5	10	5	63	6.3

NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD CO.

Statement Showing the Total Number of Revenue Passengers "On and Off", and the Average Per Day Using Train 916, Departing Butler, N.J. 7:14 AM, Arriving Susquehanna Transfer, N.J. 8:23 AM, for Period October 17th to October 21st, and October 24th to October 28th inclusive, 1960.

From	To	OCTOBER										Total Psgrs	Average Psgrs Per Day
		17	18	19	20	21	24	25	26	27	28		
Butler	Susq. Tfr.	0	0	0	0	0	0	0	0	0	0	0	0
Pompton Lakes		0	0	0	0	0	0	0	0	0	0	0	0
Oakland		2	1	2	2	1	1	3	2	4	6	24	2.4
Crystal Lake		0	0	0	0	0	0	0	0	0	0	0	0
Campgaw		3	6	4	4	4	4	4	3	4	2	38	3.8
Wyckoff		9	9	8	6	10	7	9	10	8	12	88	8.8
Wortendyke		1	1	1	1	0	2	2	1	2	1	12	1.2
Midland Park		2	3	3	1	2	4	5	9	4	3	36	3.6
No. Hawthorne		6	5	6	8	9	8	5	6	6	6	65	6.5
Hawthorne		11	12	10	11	12	9	12	9	10	11	107	10.7
Riverside		0	0	0	0	0	0	0	0	0	0	0	0
Paterson B'way		4	2	2	5	3	4	4	6	4	7	41	4.1
Vreeland Avenue		10	12	14	11	14	12	13	14	11	11	122	12.2
East Paterson		4	4	4	3	3	3	2	3	4	4	34	3.4
Passaic Jct.		0	0	0	0	0	0	0	0	0	0	0	0
Rochelle Park		12	15	16	14	13	9	13	15	12	13	132	13.2
Maywood		16	16	16	13	15	16	13	12	14	11	142	14.2
Prospect Avenue		3	3	3	1	2	3	1	1	0	3	20	2.0
Hackensack		3	3	3	3	2	3	3	1	2	4	27	2.7
Bogota		1	2	5	2	2	1	2	2	2	0	19	1.9
Ridgefield Park		0	1	0	1	0	0	0	0	0	0	2	.2
Little Ferry		2	0	0	0	1	0	0	0	0	0	3	.3
Sabbitt		0	0	0	0	0	0	0	0	0	0	0	0
North Bergen		0	0	0	0	0	0	0	0	0	0	0	0
Total		89	95	97	86	93	86	91	94	87	94	912	91.2
Paterson, N.J. and East		55	58	63	53	55	51	51	54	49	53	542	54.2
Hawthorne and No. Hawthorne, N.J.		17	17	16	19	21	17	17	15	16	17	172	17.2
Midland Park and West		17	20	18	14	17	18	23	25	22	24	198	19.8

[fol. 134]

EXHIBIT No.

Susquehanna Transfer, N.J. 5:10 PM Arriving Butler, N.J.
6:22 PM, for Period October 17th to October 21st, and
October 24th to October 28th inclusive, 1960.

From	To	OCTOBER										Total Pgtrs	Average Pgtrs Per Day
		17	18	19	20	21	24	25	26	27	28		
Susquehanna Tfr.	No. Bergen	0	0	0	0	0	0	0	0	0	0	0	0
	Babbitt	0	0	0	0	0	0	0	0	0	0	0	0
	Little Ferry	0	0	0	0	0	0	0	0	0	0	0	0
	Ridgefield Park	0	0	0	0	0	0	0	0	0	0	0	0
	Bogota	0	0	0	0	0	0	0	0	0	1	0	.1
	Hackensack	1	2	1	1	1	1	1	1	1	1	11	1.1
	Prospect Avenue	0	0	1	0	1	0	0	0	0	0	2	.2
	Maywood	2	4	5	4	4	4	4	1	3	3	34	3.4
	Rochelle Park	4	5	4	5	3	4	3	5	6	4	43	4.3
	Passaic Jct.	0	0	0	0	0	0	0	0	0	0	0	0
	East Paterson	0	0	0	0	0	0	0	0	0	0	0	0
	Vreeland Avenue	4	3	5	4	2	5	5	3	6	3	40	4.0
	Paterson B'way	3	3	1	3	4	0	1	3	3	3	24	2.4
	Riverside	0	0	0	0	0	0	0	0	0	0	0	0
	Hawthorne	6	6	6	6	3	6	7	4	7	6	57	5.7
	No. Hawthorne	2	1	2	2	0	2	2	1	2	1	15	1.5
	Midland Park	1	1	0	0	0	3	0	1	0	1	7	.7
	Wortendyke	2	1	2	1	1	3	2	1	2	1	16	1.6
	Wyckoff	4	3	3	3	3	2	2	2	2	2	26	2.6
	Campgaw	1	1	2	1	2	3	3	0	1	2	16	1.6
	Crystal Lake	0	0	0	0	0	0	0	0	0	0	0	0
	Oakland	3	1	2	5	2	2	2	2	2	2	23	2.3
	Pompton Lakes	0	0	0	0	0	0	0	0	0	0	0	0
	Butler	0	0	0	0	0	0	0	0	0	0	0	0
	Total	33	31	34	35	26	35	32	24	35	30	315	31.5
	Paterson N.J. and East	14	17	17	17	15	14	11	13	19	15	155	15.5
	Hawthorne and No. Hawthorne, N.J.	8	7	8	8	3	8	9	5	9	7	72	7.2
	Midland Park, N.J. and West	11	7	9	10	8	13	9	6	7	8	88	8.8
	Intrastate Passengers	10	18	16	11	23	17	20	17	17	15	164	16.4
	Total All Passengers	43	49	50	46	49	52	52	41	52	45	479	47.9

Daily except Saturday, Sunday and Holidays

NEW YORK, SUSQUEHANA AND WESTERN RAILROAD COMPANY.

Statement Showing the Total Number of Revenue Passengers "On and Off" and the Average Per Day Using Train 923 Departing Susquehanna Transfer, N.J. 5:37 PM Arriving Butler, N.J. 6:42 PM, for Period October 17th to October 21st, and October 24th to October 28th, inclusive, 1960.

From	To	OCTOBER										Total Psgrs	Average Psgrs Per Day
		17	18	19	20	21	24	25	26	27	28		
Susquehanna Tfr.	No. Bergen	0	0	0	0	0	0	0	0	0	0	0	0
	Babbitt	0	0	0	0	0	0	0	0	0	0	0	0
	Little Ferry	0	0	0	0	0	0	0	0	0	0	0	0
	Ridgefield Park	0	0	0	0	0	0	0	0	0	0	0	0
	Bogota	0	0	0	0	0	0	0	0	0	0	0	0
	Hackensack	0	0	0	0	0	0	0	0	0	0	0	0
	Prospect Avenue	0	0	0	0	0	0	0	0	0	0	0	0
	Maywood	15	15	14	13	18	17	23	14	16	15	160	16.0
	Rochelle Park	14	10	17	13	16	15	14	13	18	17	147	14.7
	Passaic Jct.	0	0	0	0	0	0	0	0	0	0	0	0
	East Paterson	0	0	0	0	0	0	0	0	0	0	0	0
	Vreeland Avenue	10	9	9	6	9	6	10	8	10	13	90	9.0
	Paterson B'way	13	17	14	19	15	15	21	12	15	17	158	15.8
	Riverside	0	0	0	0	0	0	0	0	0	0	0	0
	Hawthorne	23	21	22	22	15	24	27	25	18	21	218	21.8
	No. Hawthorne	7	11	10	7	8	9	10	10	7	8	87	8.7
	Midland Park	6	4	5	4	4	3	5	6	7	4	48	4.8
	Wortendyke	3	2	2	3	1	4	2	3	3	4	27	2.7
	Wyckoff	20	18	20	20	17	21	20	17	20	19	192	19.2
	Campgaw	1	2	1	2	0	0	1	3	1	1	12	1.2
	Crystal Lake	0	0	1	0	0	0	0	0	0	0	1	1.0
	Oakland	3	5	5	4	4	2	6	5	5	7	46	4.6
	Pompton Lakes	0	0	0	0	0	0	0	0	0	0	0	0
	Butler	0	0	0	0	0	0	0	0	0	0	0	0
	Total	115	120	107			116	116	126			1,186	11.5
		114	113				139	120					
Paterson, N.J. and East		52	51	54	51	58	53	68	47	59	62	555	55.5
Hawthorne and No. Hawthorne, N.J.		30	32	32	29	23	33	37	35	25	29	305	30.5
Midland Park, N.J. and West		22	21	20	22	26	20	21	21	26	25	206	20.6

From	To	OCTOBER										Total Pgtrs	Average Pgtrs Per Day
		17	18	19	20	21	24	25	26	27	28		
Susquehanna Tfr.	No. Bergen	0	0	0	0	0	0	0	0	0	0	0	0
	Babbitt	0	0	0	0	0	0	0	0	0	0	0	0
	Little Ferry	0	0	0	0	0	0	0	0	0	0	0	0
	Ridgefield Park	0	0	0	0	0	0	0	0	0	0	0	0
	Bogota	0	0	0	0	0	0	0	0	0	0	0	0
	Hackensack	0	0	0	0	0	0	0	0	0	0	0	0
	Prospect Avenue	0	0	0	0	0	0	0	0	0	0	0	0
	Maywood	15	15	14	13	18	17	23	14	16	15	160	16.0
	Rochelle Park	14	10	17	13	16	15	14	13	18	17	147	14.7
	Passaic Jct.	0	0	0	0	0	0	0	0	0	0	0	0
	East Paterson	0	0	0	0	0	0	0	0	0	0	0	0
	Vreeland Avenue	10	9	9	6	9	6	10	8	10	13	90	9.0
	Paterson B'way	13	17	14	19	15	15	21	12	15	17	158	15.8
	Riverside	0	0	0	0	0	0	0	0	0	0	0	0
	Hawthorne	23	21	22	22	15	24	27	25	18	21	218	21.8
	No. Hawthorne	7	11	10	7	8	9	10	10	7	8	87	8.7
	Midland Park	6	4	5	4	4	3	5	6	7	4	48	4.8
	Wortendyke	3	2	2	3	1	4	2	3	3	4	27	2.7
	Wyckoff	20	18	20	20	17	21	20	17	20	19	192	19.2
	Campgaw	1	2	1	2	0	0	1	3	1	1	12	1.2
	Crystal Lake	0	0	1	0	0	0	0	0	0	0	1	1
	Oakland	3	5	5	4	4	2	6	5	5	7	46	4.6
	Pompton Lakes	0	0	0	0	0	0	0	0	0	0	0	0
	Butler	0	0	0	0	0	0	0	0	0	0	0	0
	Total	115	120	107			116	116	126			1,186	11.8
		114	113				119	120					
	Paterson, N.J. and East	52	51	54	51	58	53	68	47	59	62	555	55.5
	Hawthorne and No. Hawthorne, N.J.	30	32	32	29	23	33	37	35	25	29	305	30.5
	Midland Park, N.J. and West	33	31	34	33	26	30	34	34	36	35	326	32.6
	Intrastate Passengers	2	1	1	2	1	2	2	1	2	1	15	1.5
	Total All Passengers	117	121	108			118	117	127			1,201	120.1
		115	115				111	122					

Daily except Saturday, Sunday and Holidays

Office of Revenue and Disbursements
Paterson - New Jersey
Dec. 5, 1960

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EXHIBIT NO. 136 TO STATEMENT

NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY

Statement Showing the Total Number of Revenue Passengers "On and Off" and the Average Per Day Using Train 929 Departing Susquehanna Transfer, N.J. 5:50 PM, Arriving Butler, N.J. 7:02 PM, for Period October 17th to October 21st, and October 24th to October 28th, inclusive, 1960

	To	OCTOBER										Total psgrs	Average Psgrs Per Day
		17	18	19	20	21	24	25	26	27	28		
Susquehanna Tfr.	No. Bergen	0	0	0	0	0	0	0	0	0	0	0	0
	Babbitt	0	0	0	0	0	0	0	0	0	0	0	0
	Little Ferry	0	0	0	0	0	0	0	0	0	0	0	0
	Ridgefield Park	0	0	0	0	0	0	0	0	0	0	0	0
	Bogota	1	2	1	2	1	1	2	2	1	2	15	1.5
	Hackensack	0	0	0	0	0	0	0	0	0	0	0	0
	Prospect Avenue	0	2	0	0	1	1	0	0	0	1	5	.3
	Maywood	8	5	7	7	6	6	1	4	2	4	50	5.0
	Rochelle Park	7	9	6	8	2	5	4	6	4	1	52	5.2
	Passaic Jct.	0	0	0	0	0	0	0	0	0	0	0	0
	East Paterson	0	0	1	1	2	1	0	1	1	1	8	.8
	Vreeland Avenue	2	5	6	4	3	5	2	4	4	2	37	3.7
	Paterson B'way	10	6	8	6	5	8	3	9	0	5	66	6.6
	Riverside	0	0	0	0	0	0	0	0	0	0	0	0
	Hawthorne	3	3	3	3	4	4	1	4	6	4	35	3.5
	No. Hawthorne	1	1	2	1	3	2	0	1	3	2	16	1.6
	Midland Park	2	1	1	3	2	1	1	3		1	15	1.5
	Wortendyke	0	1	1	0	0	0	1	0		0	3	.3
	Wyckoff	2	1	1	0	2	2	0	1	3	3	15	1.5
	Campgaw	1	1	1	0	1	0	1	1	0	0	6	.6
	Crystal Lake	1	1	0	1	1	1	1	1	1	1	9	.9
	Oakland	1	1	1	2	1	0	1	2	3	1	13	1.3
	Pompton Lakes	0	0	0	0	0	0	0	0	0	0	0	0
	Butler	0	0	0	0	0	0	0	0	0	0	0	0
	Total	39	39	39	38	34	37	18	39	34	28	345	34.5
	Paterson, N.J. and East	28	29	29	28	20	27	12	26	18	16	233	23.3
	Hawthorne and No. Hawthorne, N.J.	4	4	5	4	7	6	1	5	9	6	51	5.1
	Midland Park, N.J. and West	7	6	5	6	7	4	5	8	7	6	61	6.1
	Intrastate Passengers	4	3	1	3	1	4	1	4	2	2	25	2.5
	Total All Passengers	43	42	40	41	35	41	19	43	36	30	370	37.0

EXHIBIT No. 137 TO STATEMENT

NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY

Statement Showing the Total Number of Revenue Passengers "On and Off" and the Average Per Day Using Train 929 Departing Susquehanna Transfer, N.J. 5:50 PM, Arriving Butler, N.J. 7:02 PM, for Period October 17th to October 21st, and October 24th to October 28th, inclusive, 1960

From	To	OCTOBER										Total. psgrs	Average Psgrs Per Day
		17	18	19	20	21	24	25	26	27	28		
From Susquehanna Tfr.	No. Bergen	0	0	0	0	0	0	0	0	0	0	0	0
	Babbitt	0	0	0	0	0	0	0	0	0	0	0	0
	Little Ferry	0	0	0	0	0	0	0	0	0	0	0	0
	Ridgefield Park	0	0	0	0	0	0	0	0	0	0	0	0
	Bogota	1	2	1	2	1	1	2	2	1	2	15	1.5
	Hackensack	0	0	0	0	0	0	0	0	0	0	0	0
	Prospect Avenue	0	2	0	0	1	1	0	0	0	1	5	.5
	Maywood	8	5	7	7	6	6	1	4	2	4	50	5.0
	Wochelle Park	7	9	6	8	2	5	4	6	4	1	52	5.2
	Passaic Jct.	0	0	0	0	0	0	0	0	0	0	0	0
	East Paterson	0	0	1	1	2	1	0	1	1	1	8	.8
	Vreeland Avenue	2	5	6	4	3	5	2	4	4	2	37	3.7
	Paterson B'way	10	6	8	6	5	8	3	9	6	5	66	6.6
	Riverside	0	0	0	0	0	0	0	0	0	0	0	0
	Hawthorne	3	3	3	3	4	4	1	4	6	4	35	3.5
	No. Hawthorne	1	1	2	1	3	2	0	1	3	2	16	1.6
	Midland Park	2	1	1	3	2	1	1	3	0	1	15	1.5
	Wortendyke	0	1	1	0	0	0	1	0	0	0	3	.3
	Wyckoff	2	1	1	0	2	2	0	1	3	3	15	1.5
	Campgaw	1	1	1	0	1	0	1	1	0	0	6	.6
	Crystal Lake	1	1	0	1	1	1	1	1	1	1	9	.9
	Oakland	1	1	1	2	1	0	1	2	3	1	13	1.3
	Pompton Lakes	0	0	0	0	0	0	0	0	0	0	0	0
	Butler	0	0	0	0	0	0	0	0	0	0	0	0
	Total	39	39	39	38	34	37	18	39	34	28	345	34.5
Paterson, N.J. and East		28	29	29	28	20	27	12	26	18	16	233	23.3
Hawthorne and No. Hawthorne, N.J.		4	4	5	4	7	6	1	5	9	6	51	5.1
Midland Park, N.J. and West		7	6	5	6	7	4	5	8	7	6	61	6.1
Intrastate Passengers		4	3	1	3	1	4	1	4	2	2	25	2.5
Total All Passengers		43	42	40	41	35	41	19	43	36	30	370	37.0

Daily Except Saturday, Sunday and Holidays

[fol. 138]

EXHIBIT NO. 14 TO STATEMENT

NEW YORK, SUSQUEHANNA AND WESTERN
RAILROAD COMPANY.METHODS USED IN DETERMINING EXPENSES
AND REVENUES ON EXHIBITS NOS. 14-A to 14-C.

EXPENSES.

WAGES (TRAIN AND ENGINE CREWS).

Wages of crews are actual costs based on actual "On Duty" and "Off Duty" time to determine daily payments plus overtime payments.

Monthly guarantee and arbitrary payments are included in wages of conductors and trainmen.

To the wages are added the cost to carrier of Railroad Retirement and Unemployment Taxes, based on the earnings up to (\$350.00 per month for 1958), (\$350.00 per month January to May 31, 1959), and (\$400.00 per month from June 1, 1959 to date). Three-fifty seconds (3 52nds) of annual earnings is added to Crew Costs to cover Vacation Allowance.

REPAIRS TO LOCOMOTIVES.

The charges to Account 311—Diesel Locomotive Repairs—Other—divided by the *total* locomotive miles operated to determine the cost per locomotive mile. Locomotives are used both in freight and passenger service.

REPAIRS TO PASSENGER CARS.

The charges to Account 317—Passenger Train Car Repairs are actual, divided by number of passenger car miles operated to determine the cost per car mile.

FUEL FOR LOCOMOTIVES

Fuel per locomotive mile for locomotives in passenger service based on 1.1 gallon per locomotive mile based on study by Motive Power Department, multiplied by cost reported on Form OS-E—Fuel & Power Statistics, to Interstate Commerce Commission.

TRAIN SUPPLIES AND EXPENSES

Based on cost chargeable to Account 462—Train Supplies and Expenses, divided by total passenger train miles operated.

DEPRECIATION

Based on cost of equipment as carried on books of Company in Account 731—Road and Equipment, at rate prescribed by Interstate Commerce Commission, effective January 1, 1955, Order No. B 593-C.

REVENUES

The revenues for 1958 and 1959 are based on studies from actual detailed count of tickets surrendered and cash fares paid. Year 1958 based on five days of October 13th [fol. 139] thru 17th inclusive. Year 1959 based on five days of October 19th thru October 23rd inclusive. The average number of passengers per day was determined, applied to number of days trains operated (255 days in 1958), (256 days in 1959), multiplied by average revenue per passenger as reported to Interstate Commerce Commission in Form A, Page 509, Line 48 (1958—46c) (1959—48c).

Revenue for year 1960 is based on actual revenue collected in two five-day periods respectively on October 17th and October 24th, projected to annual basis.

NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY.

Statement of Revenues and Selected Items of Expense
in Connection with the Operation of Trains 908 and 919
for Years 1958, 1959 and Nine Months of Year 1960.

	1958	1959	Nine Months 1960
(A) - <u>Expenses:</u>			
1. Wages (Train and Engine Crew)	\$32,032	\$32,488	\$26,764
2. Payroll Taxes	1,470	1,677	1,288
3. Vacation Allowances	1,848	1,874	1,449
4. Repairs to Locomotives	8,425	10,609	9,182
5. Repairs to Passenger Cars	1,610	1,828	1,519
6. Fuel for Locomotives	2,477	2,508	1,557
7. Train Supplies and Expenses	5,839	2,502	2,984
8. Depreciation - Locomotives and Cars	10,143	8,015	5,633
9. Erie Railroad Track & Jersey City, N.J. Passenger Terminal Facilities	20,195	6,843	4,942
10. Total Expenses	\$84,039	\$68,344	\$55,318
(B) - <u>Revenues:</u>			
11. Passenger	\$33,431	\$31,334	\$23,198
12. Less Amount Chargeable to (Account 102 - Passenger Revenue) Account Erie RR Ferry	3,501	-	-
13. Net Passenger Revenue	\$29,930	\$31,334	\$23,198
(C) - Loss:	\$54,109	\$37,010	\$32,120

Figures for 1958 and 1959 are actual.

Figures for 1960 are computed in manner set forth in petition.

[fol. 140]

EXHIBIT No. 14A to STATEMENT

NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY.

Statement of Revenues and Selected Items
of Expense in Connection with Operation
of Trains 910 and 923 for Years 1958,
1959 and For Nine Months of Year 1960.

	1958	1959	Nine Months 1960
(A) - <u>Expenses:</u>			
1. Wages (Train and Engine crew)	\$32,867	\$33,540	\$27,662
2. Payroll Taxes	1,470	1,676	1,288
3. Vacation Allowance	1,893	1,932	1,458
4. Repairs to Locomotives	8,425	10,609	9,182
5. Repairs to Passenger Cars	2,117	2,285	2,659
6. Fuel for Locomotives	2,477	2,507	1,557
7. Train Supplies and Expenses	7,785	3,128	5,222
8. Depreciation - Locomotives and Cars	12,272	9,053	6,249
9. Erie Railroad Track & Jersey City, N.J. Passenger Terminal Facilities	20,197	6,843	4,942
10. Total Expenses	\$89,533	\$71,573	\$60,219
(B) - <u>Revenues:</u>			
11. Passenger	\$62,990	\$55,050	\$46,784
12. Less amount Chargeable to (Account 102 - Passenger Revenue) Account Erie RR Ferry	3,501	-	-
13. Net Passenger Revenue	\$59,489	\$55,050	\$46,784
(C) - <u>Loss:</u>	\$30,044	\$16,523	\$13,435

Figures for 1958 and 1959 are actual.

Figures for 1960 are computed in manner set forth in petition

Office of Revenue and Disbursements
Paterson - New Jersey
December 27, 1960

EXHIBIT NO. 14B TO STATEMENT

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NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY.

Statement of Revenues and Selected Items
of Expense in Connection with the
Operation of Trains 916 and 929
For Years 1958, 1959 and Nine
Months of Year 1960.

	1958	1959	Nine Months 1960
(A) - Expenses:			
1. Wages (Train and Engine Crew)	\$31,811	\$32,487	\$26,764
2. Payroll Taxes	1,470	1,676	1,288
3. Vacation Allowance	1,832	1,871	1,449
4. Repairs to Locomotives	8,425	10,609	9,185
5. Repairs to Passenger Cars	1,073	1,371	1,140
6. Fuel for Locomotives	2,477	2,507	1,559
7. Train Supplies & Expenses	3,892	1,877	2,239
8. Depreciation - Locomotives and Cars	8,015	6,950	5,017
9. Erie Railroad Track & Jersey City, N.J. Passenger Terminal Facilities	20,195	6,843	4,943
10. Total Expense	\$79,190	\$66,191	\$53,584
(B) - Revenues:			
11. Passenger	\$30,029	\$31,212	\$40,801
12. Less amount Chargeable to (Account 102 - Passenger Revenue) Account Erie R.R. Ferry	3,501		
Net Passenger Revenue	\$26,528	\$31,212	\$40,801
(C) - Loss:	\$52,662	\$34,979	\$12,783

Figures for 1958 and 1959 are actual.

Figures for 1960 are computed in manner set forth in petition.

Office of Revenue and Disbursements
Paterson - New Jersey
December 27, 1960

EXHIBIT NO. 14C TO STATEMENT

142

Notice of Proposed Discontinuance of Service

BEFORE THE INTERSTATE COMMERCE COMMISSION

New York, Susquehanna and Western Railroad Company, 160 Market Street, Paterson 1, N. J., hereby gives notice under Section 13a (1) of the Interstate Commerce Act (Transportation Act of 1958, Public Law 85-625, 85th Congress, 2nd Session) that effective 12:01 A. M., January 30, 1961, it will discontinue operation of its eastbound passenger trains Nos. 908, 910, 916 and westbound passenger trains 919, 923 and 929 operating daily except Saturday, Sunday and holidays and westbound passenger train No. 915 operating Good Friday, Election Day, December 23rd and December 30th. The eastbound trains operate between Butler, New Jersey and New York, New York. The westbound trains operate between New York, New York and Butler, New Jersey.

All these trains serve the following stations, depots or facilities:

Butler, N. J.	Hawthorne, N. J.
Oakland, N. J.	Paterson (Broadway), N. J.
Campgaw, N. J.	Vreeland Ave. (Paterson), N. J.
Wyckoff, N. J.	Rochelle Park, N. J.
Wortendyke, N. J.	Maywood, N. J.
Midland Park, N. J.	Port Authority Bus Terminal,
North Hawthorne, N. J.	New York, N. Y.

The following stations, depots or facilities are served by the trains whose numbers are shown opposite their name:

Pompton Lakes, N. J.	908, 910, 915, 919 & 929
West Oakland, N. J.	910, 915, 919 & 929
Crystal Lake, N. J.	908, 919 & 929
East Paterson, N. J.	908, 916, 915, 919 & 929
Prospect Ave. (Hackensack), N. J.	908, 916, 915, 919 & 929
Hackensack, N. J.	908, 910, 916, 915, 919 & 929
Bogota, N. J.	908, 916, 915, 919 & 929
Ridgefield Park, N. J.	908, 916, 919 & 929
Little Ferry, N. J.	916 & 929
Babbitt, N. J.	908 & 919
North Bergen, N. J.	908

Discontinuance of Service

New York, Susquehanna and Western Railroad Company, 160 Market Street, Paterson 1, N. J., hereby gives notice under Section 13a (1) of the Interstate Commerce Act (Transportation Act of 1958, Public Law 85-625, 85th Congress, 2nd Session) that effective 12:01 A. M., January 30, 1961, it will discontinue operation of its eastbound passenger trains Nos. 908, 910, 916 and westbound passenger trains 919, 923 and 929 operating daily except Saturday, Sunday and holidays and westbound passenger train No. 915 operating Good Friday, Election Day, December 23rd and December 30th. The eastbound trains operate between Butler, New Jersey and New York, New York. The westbound trains operate between New York, New York and Butler, New Jersey.

All these trains serve the following stations, depots or facilities:

Butler, N. J.	Hawthorne, N. J.
Oakland, N. J.	Paterson (Broadway), N. J.
Campgaw, N. J.	Vreeland Ave. (Paterson), N. J.
Wyckoff, N. J.	Rochelle Park, N. J.
Wortendyke, N. J.	Maywood, N. J.
Midland Park, N. J.	Port Authority Bus Terminal,
North Hawthorne, N. J.	New York, N. Y.

The following stations, depots or facilities are served by the trains whose numbers are shown opposite their name:

Pompton Lakes, N. J.	908, 910, 915, 919 & 929
West Oakland, N. J.	910, 915, 919 & 929
Crystal Lake, N. J.	908, 919 & 929
East Paterson, N. J.	908, 916, 915, 919 & 929
Prospect Ave. (Hackensack), N. J.	908, 916, 915, 919 & 929
Hackensack, N. J.	908, 910, 916, 915, 919 & 929
Bogota, N. J.	908, 916, 915, 919 & 929
Ridgefield Park, N. J.	908, 916, 919 & 929
Little Ferry, N. J.	916 & 929
Babbitt, N. J.	908 & 919
North Bergen, N. J.	908

Persons desiring to object to the proposed discontinuance should promptly notify the Interstate Commerce Commission at Washington, D. C. of such objection and reasons therefor, at least 15 days before the effective date of the proposed discontinuance.

**NEW YORK, SUSQUEHANNA AND WESTERN
RAILROAD COMPANY**

160 Market Street
Paterson 1, N. J.

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December 29, 1960

[fol. 144]

[Handwritten notation—Jan--9, '61.]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 21417

PETITION OF THE STATE OF NEW JERSEY AND ITS BOARD OF PUBLIC UTILITY COMMISSIONERS FOR AN INVESTIGATION UNDER SECTION 13a (1) OF THE PROPOSED DISCONTINUANCE OF OPERATION OF ALL OF ITS PASSENGER TRAINS BY NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY—January 5, 1961

David D. Ferman
Attorney General of the
State of New Jersey
State House Annex
Trenton 25, New Jersey

Of Counsel:

William Gural, Deputy Attorney General
Henry B. Freefield
c/o Board of Public Utility Commissioners
101 Commerce Street
Newark 2, New Jersey

Dated: January 5, 1961.

[fol. 145] Come now the ~~sovereign~~ State of New Jersey and its Board of Public Utility Commissioners, hereinafter called Petitioners, in support of their petition for an investigation under Section 13a (1) of the Interstate Commerce Act of the proposed discontinuance of operation of all of its passenger trains by New York, Susquehanna and Western Railroad Company.

I

The Board of Public Utility Commissioners of the State of New Jersey, ~~one~~ of the Petitioners herein, is a body created by statute and is vested with jurisdiction over common carriers by railroad within New Jersey, including jurisdiction over intrastate passenger service.

II

New York, Susquehanna and Western Railroad Company, hereinafter called Susquehanna, is a common carrier by railroad subject to the provisions of the Interstate Commerce Act and engaged, among other things, in the operation of passenger trains interstate between points in the State of New Jersey. Susquehanna passengers whose destination is New York, New York, use a motor-coach service from Susquehanna Transfer (North Bergen), New Jersey to New York, New York. However, Susquehanna's passenger trains operate between Butler, New Jersey and Susquehanna Transfer in North Bergen, New Jersey and all intermediate points are located within the State of New Jersey.

III

On December 30, 1960 the Honorable Robert B. Meyner, Governor of the State of New Jersey, and the Honorable Edward F. Hamill, Secretary, Board of Public Utility Commissioners of New Jersey, received by mail a copy of a notice issued by Susquehanna proposing discontinuance under Section 13a (1) of the Interstate Commerce Act of all of its passenger train service and a copy of its "Statement in Relation to Proposed Discontinuance of Train Service." The notice of proposed discontinuance of service states that effective 12:01 A. M., January 30, 1961, Susquehanna will discontinue operation of its eastbound passenger trains Nos. 908, 910, 916 and westbound passenger trains 919, 923 and 929 operating daily except Saturday, Sunday and holidays, and westbound passenger train No. 915 operating Good Friday, Election Day, December 23rd and December 30th.

IV

Susquehanna's "Statement in Relation to Proposed Discontinuance of Train Service" reads (page 2): "The operation is by rail to a point called Susquehanna Transfer, located in the Township of North Bergen, New Jersey [fol. 147] thence to Port Authority Bus Terminal by contract bus operated exclusively for Susquehanna's passen-

gers by Public Service Coordinated Transport. The foregoing operation makes these interstate traffic within the purview of subdivision (1) of Section 13a of the Interstate Commerce Act. See extracts from reports of this Commission approving this contract bus operation, and from opinion of the United States Supreme Court, in Exhibit 2 hereto."

Exhibit 2 quotes from Commission findings in *New York, S. & W. R. Co. Common Carrier Application*, 34 M.C.C. 581 (1942); on rehearing 46 M.C.C. 713 (1946), and a statement by Division 2 in *Commulation of Rates, New York, S. & W. R. Co.*, 280 I.C.C. 31 (1951); also statements of the Supreme Court in *Chicago v. Atchison, T. & S. F. R. Co.*, 357 U.S. 77 (1958).

Exhibit 2 does not contain the following quotation, taken from *New York, S. & W. R. Co. Common Carrier Application*, 41 M.C.C. 713, 725:

"Certain protestants contend that if the described service is found to be within the exemption in question, applicant is required to obtain a certificate in accordance with section 1 (18) of the act. That section provides that it shall be unlawful for any carrier by railroad subject to the act to undertake the extension of its line of railroad or to engage in transportation over such extended line unless and until it first shall have obtained from us a certificate of public convenience and necessity, except that, under section 1 (22) such requirement does not apply in the case of the construction of spur, industrial, team, switching, or side tracks wholly within one State. Section 1 (18) is applicable here only in the event the described operation constitutes in fact an extension of applicant's line of railroad. [fol. 148] The instant situation is comparable to that considered by the Commission, division 4, in *Arlington & F. A. R. Co. Extension of Operation*, 228 I.C.C. 479, and we conclude for the reasons there stated that applicant's described motor operation is not an extension of railroad as contemplated by section 1 (18). The certificate requirements of section 1 (18), therefore, are inapplicable."

The Commission stated in *Arlington & F. A. B. Co. Extension of Operation*, 228 I.C.C. 479, 481:

"The Supreme Court has indicated by its language in several cases that it considers an extension of a line of railroad to mean an extension of the tracks or of the physical facilities that are themselves essential to the operation of a railroad. *Texas & P. Ry. Co. v. Gulf, C. & S. F. Ry. Co.*, 270 U.S. 266, *California R. Comm. v. Southern Pac. Co.*, 264 U.S. 331. In *New York Dock Ry. v. Pennsylvania R. Co.*, 62 Fed. (2d) 4010, decided by the Circuit Court of Appeals for the Third Circuit, certiorari denied by the Supreme Court, 289 U.S. 750, a suit had been brought to enjoin the Pennsylvania Railroad Company from establishing without our approval a pick-up and delivery freight service in New York City by means of motortrucks operated to and from the railroad terminals belonging to that carrier located along the waterfront. The complainants contended that the proposed service constituted an extension of the line of railroad for which a certificate of public convenience and necessity was required by section 1 (18) of the Interstate Commerce Act. The court therein differentiated between an extension of a line of railroad and an extension of transportation service and pointed out that there was no requirement that a certificate be obtained for the latter. It found that the proposed service was not a line of railroad and was not an extension of a [fol. 149] line of railroad within the meaning of the act. The decision clearly shows that an extension of a line of railroad within the meaning of the section herein involved means an extension of the railroad itself and not of service appurtenant thereto.

Susquehanna now asks the Commission to consider the motor bus operation between Susquehanna Transfer and New York City as a line of its railroad or an extension of its line of railroad over which its trains operate between points in New Jersey and New York. The fact is that Susquehanna's trains do not operate between Susquehanna Transfer and New York City. The Commission has found

that the motorbus service between Susquehanna Transfer and New York City is not a line of railroad or an extension of a line of railroad.

Your petitioners, therefore, pray that the Commission enter upon an investigation of the proposed discontinuance and your petitioners move that the Commission dismiss the case without prejudice since, for the reasons set out above, your petitioners believe that the matter has been improperly brought under section 13a (1) of the act in the first instance.

V

Petitioner, Board of Public Utility Commissioners of the State of New Jersey, has pending before the Commission in Finance Docket No. 21049 an application under paragraph 2 of section 5 of the Interstate Commerce Act for an order of approval and authorization of acquisition of trackage rights by Susquehanna over railroad lines owned or operated by The Delaware, Lackawanna and Western Railroad Company and Erie Railroad Company (now Erie Lackawanna Railroad Company), and the joint use of the Hoboken, New Jersey terminal incident thereto.

[fol. 150] All rights of your petitioners in Finance Docket No. 21049 and in the present proceeding are reserved, and failure to adduce arguments on the merits shall not be construed as a waiver of any rights to produce evidence, cross-examine witnesses, or otherwise participate in the above-named proceedings or any related proceedings that may be instituted before the Commission.

Respectfully submitted,

David D. Fufman, Attorney General of the State of New Jersey, State House Annex, Trenton 25, New Jersey, By: William Gural, Deputy Attorney General, Henry B. Freefield, c/o Board of Public Utility Commissioners.

Dated: January 5, 1961

[fol. 151] Certificate of Service (omitted in printing).

[fol. 153]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Finance Docket No. 21417

In the Matter of

NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY
Discontinuance of Passenger Service Between New
York, N. Y., and Butler, N. J.

REPLY TO THE PETITION OF THE STATE OF NEW JERSEY AND
ITS BOARD OF PUBLIC UTILITY COMMISSIONERS

REQUEST FOR EXTENSION OF TIME—January 27, 1961

Comes now the New York, Susquehanna and Western Railroad Company, the carrier proposing the discontinuance in the above-captioned matter, by way of reply to the Petition of the State of New Jersey and its Board of Public Utility Commissioners, and says that:

I

The said petition is not directed to the merits of the above-captioned matter in that it makes no contention that the subject service between New York, N.Y. and Butler, N. J. is required by public convenience and necessity, and that it will not unduly burden inter-state or foreign commerce.

II

The said petition is, in substance, a motion to dismiss for supposed lack of jurisdiction to which the carrier is entitled to file and serve a reply within 20 days after the filing of said petition on January 9, 1961.

III

The said petition must be taken to admit the statements contained in the "Statement" filed by the carrier in this

[fol. 154] matter, for the purposes of the motion, but it attempts to advance the argument of the motion on the basis of facts contrary to those set forth in said "statement".

IV

The said motion is predicated upon the argument that in a physical sense the train locomotive and passenger car of each train moves between Butler, N. J. and Susquehanna Transfer, also within the boundaries of New Jersey, and that the contract bus service between Susquehanna Transfer and New York, N. Y. is not part of a line of railroad within the meaning of section 1(18) of the act. The argument is erroneous because

(a) the meaning of the term "line of railroad" as used in section 1(18) of the act is neither relevant to nor dispositive of the question of the applicability of section 13a(1);

(b) the authorities cited in and by said petition establish a distinction between the term "a line of railroad" and the term "service"; and while section 1(18) of the act is applicable only to "a line of railroad", section 13a(1) embraces within its purview the "operation" or "service" of a train from a point in one State to a point in another State;

(c) by virtue of the provisions of section 202 (c) of the act, "the provisions of this part" [Part II] "shall not apply" to transportation by motor vehicle by a carrier by railroad subject to Part I; but such transportation shall be considered to be and shall be regulated as transportation subject to Part I when performed by such carrier by railroad; and, since said section 13(a)1 is encompassed within said Part I, the said contract bus service is deemed, in contemplation of law, to be the equivalent of the physical operation of the said trains between the points served by the said buses;

[fol. 155] (d) to the extent that there may be any conflict between the term "line of railroad" as used in section 1(18)

of the act, and the terms "operation" and "service" as used in section 13(a)1 of the act, the latter, as the most recent expression of the intention of the Congress, must prevail;

(e) the said petition admits, at least by failure to deny if not by reason of being required to admit for the purposes of the motion, the repeated findings of the Commission set out in Exhibit 2 attached to the "Statement" filed by the carrier holding, in substance, that the carriage of passengers by motor coach between New York, N.Y. and Susquehanna Transfer is an intraterminal operation within the carrier's terminal area at New York; that such service is incidental to transportation by rail; that North Berge (where Susquehanna Transfer is located) is within the carrier's terminal area at "New York"; that no tickets are sold to or from Susquehanna Transfer, and that it is not intended that any passenger should either start or terminate a trip at that point; its use being limited solely to the transfer of passengers from train to bus or from bus to train; that the motor coach service carries no passengers except passengers carried by the train with New York as their destination, or to be carried by the train with New York as their point of origin.

V

The said motion purports to contend that the subject trains operate intrastate between Butler and Susquehanna Transfer; but it nowhere asserts that there is not an interstate service or operation; and the mere fact that there is an insignificant and trivial use of the trains by a very small number of passengers intrastate fails to establish that the interstate operation or service is not within the purview of section 13(a)1 of the act.

[fol. 156]

VI

The said motion does not in any way deny or refute the facts set forth in Exhibits Nos. 13-A through 13-F, setting out the results of actual day-to-day counts of inter-

state and intrastate passengers and which show a daily average number of passengers in each category as follows:

Train No.	Total	Interstate #	Intrastate
908	47.7	39.7	8.0
910	126.4	120.1	6.3
916	112.5	91.2	21.3
919	47.9	31.5	16.4
923	120.1	118.6	1.5
929	37.0	34.5	2.5

These facts show, beyond shadow of doubt, the insubstantial nature of any contention that the subject trains are of primarily intrastate, rather than interstate, nature.

VII

The motion asserts that the carrier asks the Commission to consider the motor bus operation as a "line of its rail road", or as an "extension of its line of railroad" over which its trains operate between points in New Jersey and New York. The assertion is an incorrect interpretation. The physical facts are well known and not in dispute. The carrier contends that the carriage of passengers by rail to Susquehanna Transfer and by motor bus thence to New York (and in reverse sequence from New York to New Jersey) is an operation or service within the purview of section 13(a)1 as a matter of law.

VIII

The motion is defective in that, if the contention thereof be accepted, the unavoidable result thereof will be that the carrier can freely, and without jurisdiction of this Commission, terminate the motor coach service between Susquehanna Transfer and New York, which service, being obviously interstate in nature, is beyond the jurisdiction (Pal. 157) of any State Board of Public Utility Commissioners, and in the operation of the subject trains between Butler, N. J. and Susquehanna Transfer (to which no tickets are sold) for the use of passengers averaging from

1.5 to 21.3 on the basis of the data set forth in Exhibits Nos. 13-A through 13-F. To say that this result will follow, as it must, refutes the contention of lack of jurisdiction in this Commission in view of the effect of terminating interstate service for passengers averaging from 31.5 to 120.1, according to the said Exhibits.

IX

Request for Extension of Time

The carrier requests the granting of an extension of time for the filing of its reply to the petition of the State of New Jersey and its Board of Public Utility Commissioners (it being the intention that if said request be granted, it will file and serve an amended reply in lieu of this reply) to and including February 20, 1961, because of the following extraordinary circumstances (this request being made less than 10 days prior to the due date of the above reply):

(a) the preparation of the proceedings for proposed discontinuance of passenger service in this matter was attended to by Leon Leighton, Esq., who for some years had been responsible for the preparation and presentation of all matters before the Commission in which the carrier had an interest, the preparation in this instance being very detailed and complicated;

(b) subsequent to the posting of notices on December 29, 1960 and the filing of the carrier's Statement herein on December 30, 1960 and in the early part of January, 1961, the relationship of attorney and client between the carrier and said attorney was terminated (but under circumstances in no way reflecting upon the integrity, performance or professional ability of said attorney), and the carrier requested its general counsel, the law firm of Lum, Bionno & [fol 158] Tompkins, to undertake the further processing of all pending matters theretofore in the hands of the said attorney, said firm having had no previous responsibility for or familiarity with the instant matter;

(c) the foregoing matters were reported by the carrier to its said general counsel on or about January 13, 1961, and a conference to enumerate and gather information about such pending matters was held on January 16, 1961, at which time the notice, the "Statement" of the carrier, and the petition of the State of New Jersey and its Board of Public Utility Commissioners were delivered to said general counsel and were seen by them for the first time;

(d) the above occurrences came about without advance notice, and the bulk and complexity of the various pending matters so received, in addition to the unforeseeable arising of a number of matters of a critical and emergency nature for other clients as well in the period from January 16, 1961 and the date hereof, made it humanly impossible to prepare a full and thorough reply. The above reply is accordingly filed with this request in order to afford counsel a reasonable time to review the matter and determine whether or not an amended reply should be prepared, filed and served. In the meantime, this reply is filed and served in evidence of the good faith of the carrier and its said general counsel, and in order that the Commission may be satisfied that this request is not presented for purposes of delay.

Respectfully submitted,

Vincent P. Biunno, William F. Tompkins, 605
Broad Street, Newark 2, N.J., Attorneys for
New York, Susquehanna and Western Railroad
Company.

Of Counsel: Lina Biunno & Tompkins, 605 Broad Street,
Newark 2, N. J.

[fol. 159] Certificate of Service (omitted in printing).

[fol. 161]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Finance Docket No. 21417

IN THE MATTER OF NEW YORK, SUSQUEHANNA AND WESTERN
RAILROAD COMPANY DISCONTINUANCE OF PASSENGER SER-
VICE BETWEEN NEW YORK, N. Y. AND BUTLER, N.J.

PETITION OF NEW YORK, SUSQUEHANNA AND WESTERN RAIL-
ROAD COMPANY FOR RECONSIDERATION OF THE ORDER OF THE
INTERSTATE COMMERCE COMMISSION, DIVISION 4, DATED
JANUARY 18, 1961—February 17, 1961

Comes now the New York, Susquehanna and Western
Railroad Company, the carrier proposing the discontinu-
ance in the above-captioned matter, in support of its
petition for reconsideration of the order of the Interstate
Commerce Commission, Division 4, dated January 18, 1961,
dismissing the notice filed by the petitioner December 30,
1960, pursuant to Section 13a(1) of the Interstate Com-
merce Act, Title 49, U.S.C. § 13a(4) for lack of jurisdiction
and says that:

I.

New York, Susquehanna and Western Railroad Company
is a common carrier by railroad subject to the provisions
of the Interstate Commerce Act, Title 49, U.S.C. § 1, et seq.,
and is engaged among other things in transporting pas-
sengers from Butler, New Jersey and other points in New
Jersey to New York City, New York.

II.

On December 30, 1960, petitioner filed notices of proposed
discontinuance of service with the Interstate Commerce
Commission, (hereinafter referred to as "Commission")
pursuant to Section 13a(1) of the Interstate Commerce
Act, Title 49, U.S.C. § 13a(1) and Title 49, Code of Federal
Regulations § 43.1, et seq. The said notices proposed that
[fol. 162] petitioner would discontinue service on its east-

bound passenger trains 908, 910 and 916 and on its west-bound passenger trains 919, 923 and 929 operating daily except Saturdays, Sundays and Holidays, and on its west-bound passenger train 915 operating Good Friday, Election Day, December 23rd and December 30th, effective 12:01 A.M. January 30, 1961. The said notices were mailed to the Governors of New York and New Jersey and were posted in every station, depot or other facility served by the said trains. In conjunction with the filing of the said notices, petitioner filed a "Statement in Relation to Proposed Discontinuance of Train Service" with the Commission, required by Title 49, Code of Federal Regulations § 43.5:

III.

On January 9, 1961, the State of New Jersey and its Board of Public Utility Commissioners (hereafter referred to as the "State"), filed a petition with the Commission praying that the Commission enter upon an investigation, and moving to dismiss the proceedings without prejudice as improperly brought under Section 13a(1) of the Act. In support of its position that the proceedings should be dismissed as improperly brought under Section 13a(1) of the Act, the State alleged that the trains operated by petitioner ran on tracks located wholly within the State of New Jersey and that the passengers traveled to New York City by a contract bus. It was further alleged by the State that Commission and Court decisions had held that the use of a bus operation did not make this operation part of a "line of railroad" or an "extension of a line of railroad" as those terms are used in Section 1(18) of the Act. It was then contended that the train operation was wholly intrastate and not within the jurisdiction of the Commission:

IV.

On January 18, 1961, prior to the time fixed by Rule 23 for petitioner to file a reply to the petition of the State, the Commission, by Division 4, entered an order dismissing the notice filed by petitioner on December 30, 1960 for lack [fol. 163] of jurisdiction. The Commission in its order of January 18, 1961 made a finding of fact that "the trains

proposed to be discontinued operate solely within the State of New Jersey" and therefore concluded "the said notice filed December 30, 1960, by the New York, Susquehanna and Western Railroad does not constitute a notice properly filed under the provisions of section 13a(1) of the Interstate Commerce Act."

V.

The order of the Commission, by Division 4, dated January 18, 1961, dismissing the notice of proposed discontinuance of service filed by petitioner on December 30, 1960 for lack of jurisdiction is improper, erroneous and illegal and should be set aside or reversed for the following reasons:

(a) Petitioner is a common carrier by railroad with authority, among others, to transport passengers by rail from points in New Jersey to New York City, New York.

(b) It is established as a matter of law (see, e.g., the *Chicago* case as well as 34 M.C.C. 581 (1942), 46 M.C.C. 713 (1946) and 280 I.C.C. 31 (1951) referred to in Exhibit 2, p. iii, annexed to petitioner's Statement herein), that "motor vehicle transportation" of an intraterminal nature is required by section 202(c) of the Act to be regarded as railroad transportation, whether performed by the railroad or, as in the present case, by an agent or contractor of its choosing; Congress is deemed to have been familiar with this requirement when it enacted section 13a(1) in 1958; wherefore it was error to conclude that petitioner's train service is only between two points in the same State.

(c) Section 13a(1) of the Act is within Part I and is applicable solely to railroads. The said section provides a method for discontinuing "the operation or service of any train or ferry operating from a point in one State to a point in any other State." The operation and service performed by petitioner, subject to Part I of the Act is to transport passengers from points in New Jersey to New York City, in New York.

[fol. 164] (d) The argument advanced by the State in its petition for an investigation and motion to dismiss con-

cerning the "line of railroad" operated by petitioner as defined in Section 10(18) of the Act is inapplicable to a proceeding brought under Section 13a(1) for the reason that the phrase "line of railroad" is not found in Section 13a(1); to the extent that these provisions may conflict, the later enactment, section 13a(1), must prevail.

(e) The legislative history of Section 13a(1), which was Section 5 of the Transportation Act of 1958, 72 Stat. 570, shows that the House Bill, HR 12832, did contain the phrase "line of railroad" but that this phrase was eliminated by the Conference Committee in the final draft which was enacted into law. 1958 U.S. Code Congressional and Administrative News pp. 3456, 3457, 3487.

(f) All of the recitals of material and relevant facts set forth in petitioner's "Statement" filed December 30, 1960 constitute evidence and are part of the record herein pursuant to Rule 19; there was no counterpleading thereto filed under the Rules of the Commission, and none of said recitals of facts were specifically denied in any such counterpleading.

(g) Petitioner was deprived of due process of law in that the Commission entered the subject Order without awaiting petitioner's Reply to the petition on which said order was based, the time for filing such Reply not having expired until January 30, 1961, without hearing or argument, and without affording petitioner a reasonable time or opportunity to be heard or to present argument on the petition upon which said Order was based.

(h) The Commission did have jurisdiction to conduct a hearing and receive argument on the question of jurisdiction advanced by the State, and it was prejudicial error to have entered the subject Order before petitioner's time to reply had expired, without hearing or argument, and without [Vol. 165] out affording petitioner a reasonable time or opportunity to be heard or to present argument thereon.

(i) Any construction of section 13a(1) of the Act which would limit its application in the case of carriers by railroad whose tracks and trains terminate their run in a

physical sense) at a river barrier forming the boundary between two States to those which continue the carriage of their passengers across such river and across the State boundary by ferry, and which would exclude such carriers when they so continue the carriage of their passengers by motor coach via river tunnel or bridge, would be in contravention of the Constitution of the United States; in that the same would constitute the giving of a preference to the ports of one State over those of another by a regulation of commerce, and would constitute a deprivation of property without due process of law; wherefore said section 13a(1) must be construed in a fashion as to include both the classes above identified so that it would not be in contravention of said Constitution.

Wherefore, your petitioner prays that the Commission reconsider the order entered January 18, 1961 by Division 4, dismissing the notices filed by your petitioner, pursuant to § 13a(1) of the Act, on December 30, 1960, seeking to discontinue its passenger trains Nos. 908, 910, 916, 919, 923, 929 and 915 operating between Butler, New Jersey and New York City, New York, for lack of jurisdiction; and that it consider petitioner's Reply to the petition of the State and afford petitioner an opportunity to be heard and present argument thereon, that it enter an order reversing and setting aside the order of January 18, 1961 and declaring that the said notices filed December 30, 1960 [fol. 166] are within the jurisdiction of the Commission and were properly filed pursuant to Section 13a(1) of the Act.

Respectfully submitted,

Vincent P. Biunno, William F. Tempkins, 605 Broad Street, Newark 2, N. J., Attorneys for New York, Susquehanna and Western Railroad Company.

Of Counsel:

Eum, Biunno & Tempkins, 605 Broad Street, Newark 2, N. J.

[fol. 167] Certificate of Service (omitted in printing).

* Application for admission has been made.

[fol. 169]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Finance Docket No. 21417

In the Matter of

NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY
 Discontinuance of Passenger Service Between New
 York, N. Y., and Butler, N. J.

AMENDED REPLY TO THE PETITION OF THE STATE OF NEW
 JERSEY AND ITS BOARD OF PUBLIC UTILITY COMMISSIONERS
 —February 17, 1961—

Comes now the New York, Susquehanna and Western Railroad Company, the carrier proposing the discontinuance in the above-captioned matter, by way of amended reply to the Petition of the State of New Jersey and its Board of Public Utility Commissioners, and says that:

I.

The said petition is not directed to the merits of the above-captioned matter in that it makes no contention that the subject service between New York, N. Y., and Butler, N. J., is required by public convenience and necessity, and that it will not unduly burden interstate or foreign commerce.

II.

The said petition is, in substance, a motion to dismiss for supposed lack of jurisdiction to which the carrier was entitled to file and serve a reply within 20 days after the filing of said petition on January 9, 1961.

[fol. 170]

III.

The said petition must be taken to admit the statements contained in the "Statement" filed by the carrier in this

matter, for the purpose of the motion, but it attempts to advance the argument of the motion on the basis of facts contrary to those set forth in said "Statement".

IV.

The said petition is not a "counterpleading" to the said Statement; it does not specifically deny any of the recitals of material and relevant facts set forth in said "Statement"; wherefore all such recitals constitute evidence and are part of the record herein pursuant to Rule 19.

V.

The said motion is predicated upon the argument that in a physical sense the train locomotive and passenger car of each train moves between Butler, N. J. and Susquehanna Transfer, also within the boundaries of New Jersey, and that the contract bus service between Susquehanna Transfer and New York, N.Y. is not part of a line of railroad within the meaning of section 1(18) of the act. The argument is erroneous because

(a) the meaning of the term "line of railroad" as used in section 1(18) of the act is neither relevant to nor dispositive of the question of the applicability of section 13a(1);

(b) the authorities cited in and by said petition establish a distinction between the term "a line of railroad" and the term "service"; and while section 1(18) of the act is applicable only to "a line of railroad"; section 13a(1) [fol. 171] braces within its purview the "operation" or "service of a train from a point in one State to a point in another State;

(c) By virtue of the provisions of section 202(c) of the act, "the provisions of this part" [Part II] "shall not apply * * * to transportation by motor vehicle, by a carrier by railroad subject to Part I * * *"; but such transportation shall be considered to be and shall be regulated as transportation subject to Part I when performed by such carrier by railroad * * *"; and, since said section 13a(1) is

encompassed within said Part 1, the said contract bus service is deemed, in contemplation of law, to be the equivalent of the physical operation of the said trains between the points served by the said buses;

(d) to the extent that there may be any conflict between the term "line of railroad" as used in section 1(18) of the act, and the terms "operation" and "service" as used in section 13a(1) of the act, the latter, as the most recent expression of the intention of the Congress, must prevail;

(e) the said petition admits, at least by failure to deny if not by reason of being required to admit for the purposes of the motion, the repeated findings of the Commission set out in Exhibit 2 attached to the "Statement" filed by the carrier holding, in substance, that the carriage of passengers by motor coach between New York, N.Y. and Susquehanna Transfer is an intraterminal operation within the carrier's terminal area at New York; that such service is incidental to transportation by rail; that North Bergen (where Susquehanna Transfer is located) is within the carrier's terminal area at New York; that no tickets are sold to or from Susquehanna Transfer, and that it is not intended that any passenger should either start or terminate a trip at that point, its use being limited solely to the transfer of passengers from train to bus or from bus to train; [fol. 172] that the motor coach service carries no passengers except passengers carried by the train with New York as their destination, or to be carried by the train with New York as their point of origin;

(f) the legislative history of section 13a(1) of the Act discloses the deliberate intent of Congress to include within the purview of said section a service like that involved here, and not to limit said sections to operations on a "line of railroad" in the sense in which that term is used in section 1(18) of the Act.

VI.

The said motion purports to contend that the subject trains operate intra-state between Butler and Susquehanna Transfer; but it nowhere asserts that there is not an in-

terstate service or operation; the evidence which is part of the record discloses that the subject service is almost entirely between various points in New Jersey and New York, N.Y.; and the mere fact that there is an insignificant and trivial use of the trains by a very small number of passengers intrastate fails to establish that the interstate operation or service is not within the purview of section 13a(1) of the act.

VII.

The said motion does not in any way deny or refute the facts set forth in Exhibits Nos. 13 A through 13 F, setting out the results of actual day-to-day counts of interstate and intrastate passengers and which show a daily average number of passengers in each category as follows:

[fol. 173]

Train No.	Total	Interstate	Intrastate
908	47.7	39.7	8.0
910	126.4	120.1	6.3
916	112.5	91.2	21.3
919	47.9	31.5	16.4
923	120.1	118.6	1.5
929	37.0	34.5	2.5

These facts show, beyond shadow of doubt, the insubstantial nature of any contention that the subject trains are of primarily intrastate, rather than interstate, nature.

VIII.

The motion asserts that the carrier asks the Commission to consider the motor bus operation as a "line of its railroad", or as an "extension of its line of railroad" over which its trains operate between points in New Jersey and New York. The assertion is an incorrect interpretation. The physical facts are well known and not in dispute. The carrier contends that the carriage of passengers by rail to Susquehanna Transfer and by motor bus thence to New York (and in reverse sequence from New York to New

Jersey) is an operation of service within the purview of section 13a(1) as a matter of law.

IX.

The motion is defective in that, if the contention that, if accepted, the inevitable result thereof will be that the carrier can freely, and without jurisdiction of this Commission, terminate the contract motor coach service between Susquehanna Transfer and New York which service, being obviously interstate in nature, is beyond the jurisdiction of any State Board of Public Utility Commissioners, and leave only the operation of the subject trains between Butler, N. J. and Susquehanna Transfer (to and from which no tickets are sold) for the use of passengers averaging from 1.5 to 21.3 on the basis of the data set forth in Exhibits Nos. 13-A through 13-F. To say that this result will follow, as it must, refutes the contention of lack of jurisdiction in this Commission in view of the effect of terminating interstate service for passengers averaging from 31.5 to 120.1, according to the said Exhibits.

X.

Any construction of Section 13a(1) of the Act which would limit its application in the case of carriers by railroad whose tracks and trains terminate their run (in a physical sense) at a river barrier forming the boundary between two States to those which continue the carriage of their passengers across such river and across the State boundary, by ferry, and which would exclude such carriers when they so continue the carriage of their passengers by motor coach via river tunnel or bridge, would be in contravention of the Constitution of the United States, in that the same would constitute the giving of a preference to the ports of one State over those of another by a regulation of commerce, and would constitute a deprivation of property without due process of law; wherefore said section 13a(1) must be construed in a fashion as to include both

[fol. 175] the classes above identified so that it would not be in contravention of said Constitution.

Respectfully submitted,

Vincent P. Brunno,* William F. Tompkins, 605 Broad Street, Newark 2, N. J., Attorneys for New York, Susquehanna and Western Railroad Company.

Of Counsel:

Lum, Brunno & Tompkins, 605 Broad Street, Newark 2, N. J.

[fol. 176] Certificate of Service (omitted in printing).

[fol. 177]

BEFORE THE INTERSTATE COMMERCE COMMISSION

RELEVANT EXTRACTS FROM THE LEGISLATIVE HISTORY
OF THE TRANSPORTATION ACT OF 1958

Mr. Smathers: . . . we would be perfectly agreeable, if the Senator from Georgia would accept the amendment, to offer an amendment which would state specifically that, with respect to any train which operates within a State whose origin and destination are within the State—that is, any train with intrastate characteristics—together with the facilities used by the train, shall be completely under the authority of the State public utilities commission, and shall not be in any way affected by the language of this particular proposal, to which the Senator from Georgia objects.

Mr. Russell: . . . What would be the effect of your proposal on the stations? Would it deny the right of the State public service commission to pass upon the closing of stations, depots, or other facilities—however the provision is spelled out in the bill—which are served by intrastate services?

Mr. Smathers: This amendment would provide that any train having its origin and destination in the same State, together with the facilities—specifically the terminals—

* Application for admission has been made.

serving that particular train, should be completely under the jurisdiction of the State regulatory body.

Mr. Russell: The language applies to the train.

Mr. Smathers: It applies also to the facilities which serve the train.

Mr. Russell: Facilities which are wholly intrastate in character?

Mr. Smathers: That is correct.

[Sen. Deb., June 11, 1958, 104 Cong. Rec. 10852]

Mr. Kuchel: Does the jurisdiction over how and when that railroad shall run its train in State A and State B rest in the discretion of the State public utilities commissions in State A and State B?

Mr. Smathers: Only with respect to discontinuance? Yes. The answer is "Yes."

Mr. Kuchel: In what respect does the Interstate Commerce Commission, under the present law, have any jurisdiction over that railroad with respect to that type of operation?

[fol. 178] Mr. Smathers: With respect to rates, and with respect to total abandonment.

Mr. Kuchel: The Senator has suggested an amendment to meet the objection of the Senator from Georgia [Mr. Russell]. How would his latest suggestion affect the example I have pointed out to him?

Mr. Smathers: If a train originated within a State and then ran across that State to the other side of the State and ended there, within that State, and never got outside that State, then with respect to discontinuance, the State public utility commission would have sole and exclusive jurisdiction.

[Sen. Deb., June 11, 1958, 104 Cong. Rec. 10852]

Mr. Kuchel: To that extent it would preempt the field and lodge discretion in the Interstate Commerce Commission with respect to discontinuance of any train. Is that correct?

Mr. Smathers: In interstate commerce; yes.

Mr. Kuchel: If it crossed a State line.

Mr. Smathers: Because that train is operating in interstate commerce. We give authority to the Interstate Commerce Commission only over interstate commerce trains. We more clearly define that the public utilities commission has authority over completely intrastate trains and facilities.

[Sen. Deb., June 11, 1958, 104 Cong. Rec. 10853]

Mr. Revercomb: Suppose a railroad had a line running through several States, and that a branch line within a State connected with the interstate line. Suppose that on the branch line and on the main line a train was operated which began and terminated its run within the State. Do I correctly understand that such a train could be discontinued only with the approval of the State commission?

Mr. Smathers: That is correct; that is because the train originates and terminates within a State.

Mr. Revercomb: The language applies to the train, irrespective of the fact that it runs on tracks which are a part of an interstate line.

Mr. Smathers: That is our understanding.

• • • If a train originates within a State, whether it be Connecticut or Massachusetts, and ends within the State, without crossing a State line, that particular train could be discontinued only with the approval of the State regulatory agency, under the amendment.

[fol. 179] Mr. Carroll: Yes; under the amendment. But I think the Senator from New Hampshire asked the question, If the New Haven decided to abandon its Boston-Providence line, under existing law does the Interstate Commerce Commission have jurisdiction? If the amendment shall be agreed to, the Bill may confer jurisdiction on the Interstate Commerce Commission.

Mr. Smathers: No. At present the Interstate Commerce Commission has the authority to authorize abandonment, even in interstate commerce. The difference is between the abandonment of train service as a whole, including the tracks and equipment, and the discontinuance of the operation of a train. Under the present law, the Interstate Commerce Commission now has the authority to permit the total abandonment of the Boston-Providence line. But

under the present law the Commission cannot permit or authorize the discontinuance of one train, which may run every day up and down that particular track.

[Sen. Deb., June 11, 1958, 104 Cong. Rec. 10853-54]

Mr. Whitten: . . . In my own State we have very few big cities. The big cities of my region are just over the line in adjoining States; for instance, Memphis, Tenn., Mobile, Ala., and New Orleans, La. This means that practically all the railroad service in my State originates just over the line; that is, the starting point of the trains is there. It strikes me that the language of section 4 would put practically the whole transportation operation in Mississippi in the Interstate Commerce Commission and would leave out any weight that the local commission would have in determining public necessity or public convenience on existing service. Is that correct?

Mr. Harris: No; the gentleman is not correct at all. . . . If there is an intrastate operation within the gentleman's State, then the intention of this State rights provision is to leave that within the jurisdiction of the commission of that State. If there is a branch line that belongs to an interstate line; which has a starting point within the State and ends within the State, that service is left with the State corporation commission.

[H. Deb., June 27, 1958, 104 Cong. Rec. 12542]

[fol. 180] Mr. Harris: . . .

Further, we leave to the State commissions complete authority over intrastate operations. A train operating over a line of railroad located wholly within a State is within the jurisdiction of the State commission. The abandonment of stations or depots is left with State commissions. So you can see that practically all of this problem of abandonment is continued with the State commissions, as it has been in the past. The Congress has never preempted that authority.

Mr. Hemphill: . . . In the event the interstate line had a train which was wholly operated within the State itself, who would have authority to discontinue that train under this bill?

Mr. Harris: The State commission would, where the train was being operated over a line of railroad located solely within that State.

Mr. Hemphill: The State commission would retain that authority under House bill?

Mr. Harris: I made that very clear and very plain that under the language of this bill, the State commission would have that authority in the instance cited.

Mr. Hemphill: Even though the train was on an interstate line?

Mr. Harris: If it was a line operation off the interstate line, wholly within the State, then the attention of this language is that the authority there would be with the local commission. If the trains were on a line of railroad not located solely within the one State, then the railroad has the option of coming to the Interstate Commerce Commission.

[H. Deb., June 27, 1958, 404 Cong. Rec. 12530]

[fol. 181]

SUPREME COURT OF THE UNITED STATES

No. 937—October Term, 1961

NEW JERSEY, *et al.*, Appellants,

vs.

NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY.

Appeal from the United States District Court for the District of New Jersey.

ORDER NOTING PROBABLE JURISDICTION—June 25, 1962

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Mr. Justice Frankfurter took no part in the consideration or decision of this case.

SUPREME COURT, U. S.

Office-Supreme Court, U.S.

FILED

MAY 4 1962

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961 2

No. ~~104~~ 104

STATE OF NEW JERSEY AND BOARD OF PUBLIC
UTILITY COMMISSIONERS OF THE STATE OF
NEW JERSEY,

Appellants,

vs.

NEW YORK, SUSQUEHANNA AND WESTERN
RAILROAD COMPANY,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

STATEMENT AS TO JURISDICTION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No.

STATE OF NEW JERSEY AND BOARD OF PUBLIC
UTILITY COMMISSIONERS OF THE STATE OF
NEW JERSEY,

Appellants,

vs.

NEW YORK, SUSQUEHANNA AND WESTERN
RAILROAD COMPANY,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

STATEMENT AS TO JURISDICTION.

Appellants, State* and Board*, appeal from so much of the final judgment of the District Court entered on January 9, 1962 as determines that the provisions of section 13a(1) of the Interstate Commerce Act (49 U. S. C. sec. 13a (1)) were properly invoked by the New York, Susquehanna and Western Railroad Company (hereinafter referred to as "Appellee") for the purpose of effecting a discontinuance of its passenger trains enumerated in the Notice filed

* Throughout this Statement as to jurisdiction we will refer to the State of New Jersey as "State" and the Board of Public Utility Commissioners of the State of New Jersey as "Board" or jointly as "Appellants."

with the Interstate Commerce Commission (hereinafter sometimes referred to as "I. C. C."). The I. C. C. Order of January 18, 1961, refusing to take jurisdiction on the ground that the train operation was solely intrastate, was thereby set aside as contrary to law. Appellants submit this statement in compliance with Rule 13(2) of the Revised Rules of the Supreme Court of the United States to show the basis upon which the Supreme Court has jurisdiction on appeal to review said judgment of the District Court, and that the questions presented are substantial.

Opinions Below.

The following are printed as appendices hereto

APPENDIX A—Opinion of the District Court filed December 7, 1961 and reported in 200 F. Supp. 860.

APPENDIX B—Final judgment of the District Court dated January 9, 1962.

APPENDIX C—Initial order of the I. C. C. dated January 18, 1961, not yet reported, dismissing for lack of jurisdiction the Appellee's notice filed December 30, 1960.

APPENDIX D—Order of the I. C. C. dated May 10, 1961 denying Appellee's motion for reconsideration of the I. C. C.'s order of January 18, 1961.

Basis of Jurisdiction.

This suit was brought under 5 U. S. C. Section 1009; 28 U. S. C. Sections 1336, 1398, 2284, 2321 to 2325 inclusive; and 49 U. S. C. Section 17(9), to review, suspend, enjoin, annul and set aside the orders of January 18, 1961 and May 10, 1961 entered by the I. C. C. in dismissing the Notice filed by the Appellee. The Appellee filed the Notice pursuant to the provisions of 49 U. S. C. section 13a(1) to dis-

continue all its passenger train service. The operation is by train from Butler, New Jersey, to a point called Susquehanna Transfer, located in the Township of North Bergen, New Jersey, thence from Susquehanna Transfer to the Port Authority Bus Terminal, New York City, New York, by contract bus operated for Appellee's passengers by Public Service Coordinated Transport Co. over a public highway. The final judgment of the District Court for the District of New Jersey (Circuit Judge McLaughlin dissenting) was dated January 9, 1962, and entered on the docket January 11, 1962. Notice of appeal was filed in the District Court for the District of New Jersey on March 6, 1962. A cross-appeal by the Appellee was served on the Appellant on March 7, 1962. The jurisdiction of the Supreme Court to review this judgment by direct appeal is conferred by 28 U. S. C. 1253 and 2101(b). There are many decisions which sustain the jurisdiction of the Supreme Court to review the judgment by direct appeal in this case. *Chicago, Milwaukee, St. P. & P. R. Co. v. State of Ill.*, 355 U. S. 300 (1958); *Alleghany Corporation v. Breswick & Co.*, 353 U. S. 151 (1957); *Pan-Atlantic St. Corp. v. Atlantic Coast L. R. Co.*, 353 U. S. 436 (1957); *Radio Corp. of America v. United States*, 341 U. S. 412 (1951); *Board of Public Utility Com'rs of N. J. v. United States*, 158 F. Supp. 98 (D. C. N. J. 1957), probable jurisdiction noted; 357 U. S. 917 (1958); *Board of Public Utility Com'rs of N. J. v. United States*, 158 F. Supp. 104 (D. C. N. J. 1957), probable jurisdiction noted, 357 U. S. 917 (1958).

Statute Involved.

The statute primarily involved is Section 13a of the Interstate Commerce Act (49 U. S. C. §13a which is set forth in Appendix E hereto), with particular reference to subsection 13a(1).

Questions Presented.

1. Whether the Interstate Commerce Commission lawfully dismissed Appellee's notice of discontinuance for lack of jurisdiction under section 13a(1) of the Interstate Commerce Act, when the trains to be discontinued operate exclusively within the State of New Jersey.

2. Whether subsection 13a(1) of the Interstate Commerce Act may be construed as referring to intrastate railroad service plus interstate autobus service, when the subsection by its very terms is limited to the discontinuance of "a train or ferry operating from a point in one State to a point in any other State," and when the legislative history of the subsection supports the view that it was intended to cover no more than a train or ferry.

3. Whether the railroad should have applied for relief under subdivision (2) of section 13a rather than under subdivision (1) of section 13a of the Interstate Commerce Act.

Statement of the Case.

On the 29th and 30th of December, 1960, the Appellee posted notices dated December 29, 1960 that it would discontinue all of its passenger service, effective January 30, 1961. This was done pursuant to Section 13a(1) of the Interstate Commerce Act.

On January 9, 1961, the State and the Board filed a petition with the I. C. C. seeking a dismissal of the Appellee's notice on the ground that the Commission lacked jurisdiction, because the *trains* involved are operating solely within New Jersey, and the service is not that of "any train or ferry operating from a point in one state to a point in any other state" * While passengers may travel between

* Section 13a(1), set out in Appendix E, p. 45 hereof.

Butler, New Jersey and New York City, the *trains* and the *tracks* on which they operate extend from Butler to Susquehanna Transfer in North Bergen, entirely within New Jersey, the passengers then being transported between Susquehanna Transfer in North Bergen and the Port Authority Terminal in New York City by contract bus on a public highway. The I. C. C., by its Order of January 18, 1961, dismissed the notice on the ground that the *trains* involved operated solely within the State of New Jersey, and that the notice therefore did not constitute a notice properly filed under Section 13a(1). Thereafter, on February 20, 1961, the Appellee filed with the I. C. C. a petition for reconsideration of the Order entered January 18, 1961. This petition was denied by I. C. C. order of May 10, 1961. The Appellee commenced an action, on May 18, 1961, in the United States District Court for the State of New Jersey challenging the I. C. C. Orders of January 18, 1961 and May 10, 1961. Subsequently, a statutory three-judge Court was convened to hear the matter.

The opinion of the Court, with one judge dissenting, *New York, Susquehanna & Western R. Co. v. United States*, 200 F. Supp. 860, 866 (D. C. N. J. 1961), " . . . that the Commission had jurisdiction over the proceeding instituted by Susquehanna under the provisions of section 13a(1) and that its order of January 18, 1961 refusing to take jurisdiction thereof was contrary to law, and should be reversed.", was filed December 7, 1961. The basis of the decision was that the bus service complemented that of the train, and vice versa, and that the combination of the two facilities, a train plus a bus, thus operating from a point in one State to a point in another State, was within the intent of Congress when it enacted Section 13a(1). Circuit Judge McLaughlin dissented on the ground that " . . . the section was directed to a particular train or ferry and the legislative history makes this crystal clear." *Id.* at 867.

Judge McLaughlin went on to say, "The statute is a lean, lucid law. It cannot be misconstrued as it stands. The majority opinion refuses to take on that impossible task. So it rests its reversal of the Interstate Commerce Commission on the proposition that what the latter does in its decision is 'thwart the *apparent* purpose of Congress in adopting it.' (Emphasis supplied.) Actually, the true purpose of Congress is expressed in the unmistakable language of 13a(1) itself. That language cannot be wrenched apart to absorb the expedient endeavor to do now what was never contemplated when the amendment was enacted." *Ibid.*

The final judgment of the District Court was entered on the docket January 11, 1962. It provided *inter alia* that the I. C. C. Order of January 18, 1961 was contrary to law; therefore, the Order was permanently suspended, enjoined, annulled and set aside. Furthermore, the Appellee was enjoined from discontinuing passenger service, until the further Order of the Court, pending appeal by Appellants to the Supreme Court of the United States.

On March 6, 1962, the State and the Board filed a notice of appeal to the Supreme Court of the United States in the U. S. District Court for the District of New Jersey. A cross-appeal by the Appellee was served on the State and the Board on March 7, 1962.

The Questions Presented are Substantial.

A. The Jurisdictional Question

The jurisdictional issue here is not only of importance to the parties herein. It is, also, of national importance because it relates to a conflict of jurisdiction over interstate and intrastate commerce between the National Gov-

ernment, acting through the I. C. C. and the States. Traditionally, this Court has always been the final arbiter of the competing demands of State and national interests.

The conflict of jurisdiction arises from the fact that if the three-judge Court decision is allowed to stand, State authority over intrastate train operations will be greatly diminished. This, because the I. C. C. will have jurisdiction in every instance where a purely intrastate train operation combines with an interstate bus to cross a state line. There are numerous examples of such operations in New Jersey, as will be seen below, and presumably in other States. The inherent (and reserved) power of the States over intrastate matters faces extinction with no clear indication that Congress intended any such result. The precedent set, therefore, has a far-reaching effect beyond the interests of the litigants here.

Congress intended, by the enactment of section 13a(2) of the I. C. C. Act, to preserve State jurisdiction over " . . . any train or ferry operated wholly within the boundaries of a single State" The language is clear and unambiguous, as is the wording in section 13a(1) of the same Act which grants to the I. C. C. the jurisdiction over " . . . the discontinuance . . . of any train or ferry . . . " but not a bus. Clearly, the impact of the instant decision is to frustrate the intent of Congress as expressed in section 13a(2). Just as the Federal Government jealously guards its constitutional prerogative in the interstate commerce domain so the States have an equal and inherent right to protect their interests in intrastate commerce. No such vested State interest should be taken away by implication which is the result of the decision below.

The effect of the decision would immediately touch other intrastate rail operations in New Jersey. In southern New

Jersey, the Pennsylvania Railroad Company and the Pennsylvania Reading Seashore Lines operate lines to Camden, New Jersey where passengers bound for Philadelphia, Pennsylvania may transfer to a bus or a subway. The Pennsylvania Railroad Company, in northern New Jersey, transports passengers from New Jersey to downtown New York via its trains with a transfer at Newark to Hudson Rapid Tubes Corporation interstate trains. Furthermore, the Central Railroad Company of New Jersey intrastate train operation runs to its terminal in Jersey City, New Jersey where its interstate ferry service is available to New York City, New York. Lastly, Hoboken, New Jersey, is the terminal of the Erie Lackawanna Railroad Company intrastate train operation with its ferry, or with train or bus connections from there to New York City. In each instance, the holding of the court below could be construed to subordinate State authority to that of the Federal Government.

Undoubtedly, the interest of the public is the paramount consideration in any train discontinuance. But if subsection 13a(2) may be by passed the rigid standards set forth therein would also be evaded to the detriment of the traveling public. Section 13a(2) requires that the State authority first pass upon the question of an intrastate train, or ferry discontinuance. If the State authority denies relief, the carrier may petition the I. C. C. for authority to discontinue the operation. However, the I. C. C. may grant the authority only after full hearing and findings of (1) that a the present or future public convenience and necessity permit of such discontinuance or change, in whole or in part, of the operation or service of such train or ferry, and (2) the continued operation or service of such train or ferry without discontinuance or change, in whole or in part, will constitute an unjust and undue burden upon the interstate

operations of such carrier or carriers or upon interstate commerce."

1. States may control intrastate commerce.

The U. S. Constitution expressly grants to Congress the power to regulate commerce "among the several States." U. S. Constit. *Art. I, § 8, clause 3*. On the other hand, "the powers not delegated to the United States by the Constitution . . . are reserved to the States respectively" U. S. Constit. *Amend. X*. Even as to interstate commerce, unless Congress has granted authority to the I. C. C. or another federal agency, the power to regulate and control rests with the State and its agencies. *Palmer v. Commonwealth of Massachusetts*, 308 U. S. 79 (1939); *Eichholz v. Public Service Commission*, 306 U. S. 268 (1939); *Port Richmond & Bergen Point Ferry Co. v. Board of Chosen Freeholders of Hudson County*, 234 U. S. 317 (1914); *State of Colorado v. United States*, 271 U. S. 153 (1926). Moreover, if the Board fails to take appropriate steps on a matter so vital to the public as the continuance of rail passenger service, it is derelict in the performance of its statutory duties. The Board is authorized to ". . . require any public utility to furnish safe, adequate and proper service" *R. S. 48:2-23*. Also, no railroad shall discontinue service without obtaining permission from the Board. *R. S. 48:2-24*. Before the Board may grant the authority to discontinue, it must find (1) "that the discontinuance, curtailment or abandonment of such service will not interfere with the public convenience and necessity and, (2) "that there is adequate substitute service available." *R. S. 48:2-24*. If the railroad is permitted to use the train-bus device to bring it within the terms of section 13a(1) the state shall never have the opportunity to make the determination called for in the state statutes, thus effectively nullifying section 13a(2) for New Jersey.

2. The Statute; Section 13a(1) of the I. C. C. Act, speaks not of "buses" but only of "a train or ferry."

The District Court was bound by the plain and unambiguous language of the statute, section 13a(1). *Helvering v. City Bank Farmers Trust Co.*, 296 U. S. 85 (1935); *United States v. Standard Brewery*, 251 U. S. 210 (1920); *Hamilton v. Rathbone*, 175 U. S. 414 (1899); *Thompson v. United States*, 246 U. S. 547 (1918).

It could not alter the terms and thus enact instead of construe the law. The plain language of the statute is "... operation or service of any train or ferry, ..." Clearly, the type of service contemplated by Congress did not include buses. As said by this Court, a train consists of "an engine and cars which have been assembled and coupled together for a run or trip along the road." *United States v. Erie R. Co.*, 237 U. S. 402, 407 (1915). Also, it has been said by this court that a "ferry is a continuation of the highway from one side of the water over which it passes to the other. . . ." *County of St. Clair v. Interstate Sand & Car Transfer Co.*, 192 U. S. 454 (1904). To include a bus within the meaning of the term "train" or "ferry" would do violence to the intent of Congress. This position is fortified by the Conference Committee report which led to the enactment of section 13a of the I. C. C. Act.

The Transportation Act of 1958 (72 Stat. 568), which includes section 13a, was enacted after a Conference Committee worked out the differences between the two Houses of Congress. Senate Bill No. 3778 was passed in lieu of the House Bill. The conference report contains not even a suggestion that bus service was contemplated in the enactment of section 13a. Rather the language is always limited to train or ferry. Thus, the report states that section 13a, added to the I. C. C. Act, relates to "... operation or service of *trains* or *ferries*. . . . Paragraph (1) deals with

the discontinuance or change of the operation of a *train* or *ferry*. . . . The Commission [I. C. C.] may require that the *train* or *ferry* be continued in operation or service pending a decision by it. . . . Paragraph (2) of the proposed new section 13a, as contained in the bill and agreed to in conference, deals with . . . a carrier or carriers of the same class referred to in paragraph (1), of the operation or service of any *train* or *ferry* operated 'wholly within the boundaries of a single state.' " (Emphasis added.) 1958 *U. S. Code Congressional and Administrative News*, pp. 3486, 7.

Congress could have used other terms in subsection 13a(1) but it *intentionally* settled on "train" and "ferry." This, because the Congressional hearings before enactment of the section are replete with the two terms. The term "bus" is never mentioned. The over-all intention of Congress is clear—to pre-empt jurisdiction where a state line is crossed by "the operation or service of any train or ferry," but in all other situations to preserve existing states' rights and to limit the proposed extension of I. C. C. jurisdiction to a train or ferry. Section 13a, and in particular subsection 13a(2), however narrowly construed, constituted a giant step in the direction of increasing I. C. C. jurisdiction. This step was hotly debated and had to go before a Senate-House Conference Committee before it was rendered agreeable to both Houses of Congress.

If Congress had intended, under section 13a(1), to authorize the discontinuance of more than the "operation or service" that is in fact provided by a "train or ferry," it could have easily so provided. For instance, it could have used terms of broader import, such as "railroad" or "transportation" as defined in the I. C. C. Act; section 1(3)(a) defines both terms: "Railroad," therein, denotes "bridges, car floats, lighters, and ferries used by or oper-

ated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property." The term "transportation" means "locomotives, cars, and other vehicles, vessels and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof" Because these terms have established meanings under the I. C. C. Act, they were well known to Congress. Since the narrower terms "train" or "ferry" were used, the presumption is that the authority granted to the I. C. C. is limited by the customary meaning of the terms adopted.

There might be some basis for the view that "any train" was used in a generic sense, had the statutory provision stopped there. But it appears that Congress contemplated one other auxiliary type of service by adding to "any train . . .," the words " . . . or ferry" (and stopped *there*); it therefore requires something more than mere interpretation or construction to incorporate in the statute words (and more importantly, concepts) which the Congress rather pointedly left out.

3. The Federal District Court has recognized that Section 13a(1) is limited to the discontinuance of a train or ferry.

The only cases that have construed the statute here involved, 49 U. S. C. §13a(1), are the ferry abandonment cases initiated by the New York Central Railroad Company ("Central") in one instance, and by the Erie Railroad

Company ("Erie") and by the present Appellee, in another instance. Both actions were begun before the enactment of section 13a(1) in 1958. The interstate ferries (between New Jersey and New York) there connected with intrastate and interstate trains in New Jersey. While the passenger ferries were proposed to be abandoned, the freight ferries were to remain in operation. The I. C. C., in both cases, granted the authority to abandon claiming it had jurisdiction under 49 U. S. C. §1(18). *New York Central Railroad Co. Ferry Abandonment*, 295 I. C. C. 385 (1956); *New York Central Railroad Co. Ferry Abandonment*, 295 I. C. C. 519 (1957); *Erie Railroad Co. Ferry Abandonment*, 295 I. C. C. 549 (1957). The statutory three-judge Court reversed the above I. C. C. decisions. *Board of Public Utility Com'rs of N. J. v. United States*, two cases, 158 F. Supp. 98 and 158 F. Supp. 104 (D. C. N. J. 1957), probable jurisdiction noted, 357 U. S. 917 (1958). The Court held that the proposed cessation of ferry service constituted a "partial discontinuance" of the railroad operation and that therefore the I. C. C. (which by statute, 49 U. S. C. §1(18), had jurisdiction only to permit complete abandonment) was without jurisdiction to permit the discontinuance in question. The crucial part of 49 U. S. C. §1(18) reads:

"... no carrier by railroad ... shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment."

The District Court decisions were appealed to this Court. Simultaneously, Congress was deliberating on what eventually became the "Transportation Act of 1958." This Court noted probable jurisdiction but before argument the matter

was rendered moot by the passage of the 1958 Transportation Act which included section 13a(1) and (2). Subsequently, the State and the Board brought two unsuccessful declaratory judgment actions to test the constitutionality of section 13a(1). In one of the two decisions upholding the statute, *State of New Jersey v. United States*, 168 F. Supp. 324 (1958), at page 337, Circuit Judge McLaughlin in dissenting, stated:

"The admitted reason for the passage of the section was our decision in *Board of Public Utility Commissioners of New Jersey v. United States of America*, D.C.D.N.J. 1957, 158 F. Supp. 98.¹ In the effort to obtain legislation which would enable this railroad or any railroad to summarily wipe out of existence any individual train or ferry or line of trains and ferries within the reach of the amendment the all pervading effect of the immediately preceding Section 13(1) and (2) was quite apparently overlooked; in any event its authority was in nowise restricted."

The footnote just after the citation of the case within the above quotation refers to a statement made by Central's counsel at the hearing on the application in that suit for a preliminary injunction. He stated, "I want to say to the Court . . . if you go back to the testimony before the committees, you'll find that this particular case was the reason for the enactment of this section." *State of New Jersey v. United States*, *supra*, p. 337.

4. The Interstate Commerce Commission has only such power as is granted to it by Congress; here, Section 13a (1) and (2), 49 U. S. C. §13a(1) and (2).

The Interstate Commerce Commission is an administrative tribunal whose jurisdiction derives solely from the act creating it. This jurisdiction is defined by statute and the Commission may not attempt to exercise any jurisdic-

tion not expressly conferred by statute or reasonably implied therein. *Seatrail Lines v. United States*, 64 F. Supp. 156 (D. C. Del. 1947), aff'd 329 U. S. 424 (1947).

Although the original Interstate Commerce Act was enacted in 1887, it was not until 1920 that the Congress undertook to occupy and delegate to the Commission jurisdiction over the abandonment of railroad lines. Transportation Act of February 28, 1920, 41 Stat. 477, par. 18, 49 U. S. C. §1(18). This enactment bestowed upon the Commission large powers which formerly had been exercised by the several states; however, the jurisdiction was limited to abandonment of a line of railroad as distinguished from a partial discontinuance or curtailment of service. As to the latter, the Commission had no jurisdiction under section 1(18) of the act. *Palmer v. Massachusetts*, 308 U. S. 79 (1939). This was the state of the law when the above-mentioned ferry cases were being decided.

Prior to the passage of the Transportation Act of 1958, while the bill was under consideration in the Senate Committee on Interstate and Foreign Commerce, the prior limitation on the jurisdiction of the I. C. C. was thus explained by Senator Smathers, the sponsor of the bill:

"Mr. Kuchel. Under the present law, when a railroad operates in two contiguous states, if a train originates in one of the States and stops in the State, and then crosses the State line and stops in the other State, what jurisdiction, under the present law, does the Interstate Commerce Commission exercise over the operation?

"Mr. Smathers. It exercises all jurisdiction with respect to the rates, and things of that character. With respect to a discontinuance, at the moment the Commission does not exercise any jurisdiction with respect to the discontinuance of a specific train, although they have complete authority with respect

to bringing about a total abandonment of the whole line or any part of it.

"Mr. Kuchel. Does the jurisdiction over how and when that railroad shall run its trains in State A and State B rest in the discretion of the State public utilities commissions in State A and State B?

"Mr. Smathers. Only with respect to discontinuance; yes. The answer is 'Yes.' " *104 Cong. Rec. 10852 (1958).*

The new statute grants the I. C. C. jurisdiction over interstate train or ferry discontinuance or change. At the same time it explicitly acknowledges that the states also have jurisdiction of such matters; it gives a railroad the option of selecting either forum.

The language of the new law makes this clear. It contemplates state regulation since the only carriers to which it applies are those "subject to any provision of the constitution or statutes of any State or any regulation or order of (or are the subject of any proceeding before) any court or administrative or regulatory agency of any State" A carrier desiring to discontinue an interstate train or ferry, according to the statutory terms, "may, but shall not be required to" file a notice with the Interstate Commerce Commission; in other words, it can, if it wishes, take its application to the state regulatory agency. Finally, the statute provides:

" . . . The provisions of this paragraph shall not supersede the laws of any State or the orders or regulations of any administrative or regulatory body of any State applicable to such discontinuance or change unless notice as in this paragraph provided is filed with the Commission. On the expiration of an order by the Commission after such investigation requiring the continuance or restoration of operation or service, the jurisdiction of any State as to such discontinuance or change shall no longer be super-

seded unless the procedure provided by this paragraph shall again be invoked by the carrier or carriers." (Emphasis added.)

In sum, it is clear that the passage of the new law did not pre-empt local regulation of an interstate train or ferry. On the contrary, the new statute declares unequivocally that the federal government desires state authority over a train or ferry to continue.

It is a familiar rule that a construction made by the body—here, the I. C. C. in relation to section 13a—charged with the enforcement of a statute, although not controlling, may be resorted to as an aid in ascertaining the legislative intent. *New York, N. H. & H. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361 (1906); *New York Central Securities Corporation v. United States*, 287 U. S. 12 (1932); *Boston & M. R. Co. v. Hooker*, 233 U. S. 97 (1914). This doctrine of contemporaneous construction of a statute applies to section 13a, because the I. C. C. has acted pursuant to its authority under that law. Moreover, this Court has said that, under certain circumstances, the I. C. C. construction of a statute may "be treated as read into the statute." *New York, N. H. & H. R. Co. v. Interstate Commerce Commission*, *supra*, p. 402.

The I. C. C. has recognized state jurisdiction under both section 13a(1) and 13a(2) of the I. C. C. Act. In a recent case before the I. C. C. (*Pennsylvania Railroad Company and Pennsylvania-Reading Seashore Lines, Discontinuance of Passenger Train Service*, Finance Docket Nos. 21606 and 21607, I. C. C., April 4, 1962, not yet reported), the Pennsylvania Railroad Company and the Pennsylvania-Reading Seashore Lines petitioned to discontinue both intrastate and interstate passenger train service. The Commission interpreted sections 13a(1) and 13a(2) to mean that under the former a carrier has the election to go before the I. C. C.

or a state commission respecting interstate train discontinuance. However, as to an intrastate discontinuance, the carrier is required first to seek relief before a state commission. The Commission stated, "With respect to carriers wishing to discontinue the operation of trains operated wholly within a single state, they are not accorded an election under the provisions of section 13a(2) such as is provided in section 13a(1). They first must proceed to seek relief from the appropriate state regulatory body before petitioning this Commission for relief, and section 13a(2) specifically prescribes the conditions that must be met before we acquire jurisdiction." The carriers there had properly proceeded initially pursuant to section 13a(2); here, the Appellee immediately petitioned under section 13a(1), disregarding section 13a(2). In the former case, some tracks and trains were interstate. A similar showing cannot be made in the instant case because the tracks are wholly within New Jersey and the trains operate wholly within this State.

The Commission went on to say: "Carriers may elect to disregard both sections, and rely solely upon the appropriate state regulatory commission for authority to discontinue certain interstate or intrastate trains. If a carrier determines to rely upon the state commissions for a portion of the relief desired, and under the provisions of section 13a(1) for additional relief from this Commission, our jurisdiction is restricted to a consideration of the specific proposals involved in the proceeding filed with us." Regarding the discontinuance of intrastate operations, section 13a(2) does not provide an alternative method (either before the I. C. C. or a state commission) as does section 13a(1). Instead, states retain primary jurisdiction over trains operated solely within their respective boundaries. Thus, "The state continues to retain original jurisdiction to

authorize the discontinuance . . . of trains operated solely within its boundaries, and the carrier may act upon the authority granted, notwithstanding the fact it may wish to invoke the jurisdiction of this Commission if portions of its application are denied by the State . . . they [carriers] were in no way obligated to retain that service as a condition precedent to filing the instant proceeding with this Commission."

B. Assuming, but not conceding, that 49 U. S. C. §13a(1) is ambiguous, a reference to the record of the legislative hearings on the bill reveals that the literal meaning of "train" and "ferry" was intended—thereby excluding any inference of a "bus" operation within the meaning of the statute.

Debates and reports in Congress with reference to a statute are a reliable extrinsic guide to the legislative intention. *United States v. Congress of Industrial Organizations*, 335 U. S. 106 (1948); *Mitchell v. Kentucky Finance Company*, 359 U. S. 290 (1959).

Congress in debating the merits of the bill, was aware of the existing law and realized that the bill would not pre-empt state jurisdiction over railroad train discontinuances. We have the words of the Chairman of the House Committee on Interstate and Foreign Commerce, Congressman Oren Harris:

"Mr. Harris. . . . Section 4 of the bill adds a new section 13a to the act, whereby the railroads, at their option, may have the Interstate Commerce Commission, rather than the State Commissions, pass upon the discontinuance or change in the operation or service of any train or ferry. This option is limited, however, to the operation or service of a train or ferry on a line of railroad not located wholly within a single State. This limitation is contained in the

bill being reported because the Committee feels that the record at this time does not support the broader change in venue, requested by the railroads, which would have covered Interstate Commerce Commission jurisdiction also over operations more local in character, such as those of a branch line or other line of railroad located solely within one State.

"The bill as introduced also covered the Interstate Commerce Commission passing upon discontinuance or change of the operation or service of stations, depots, or other facilities. This jurisdiction has not been included in the bill as reported, as the committee believes the record presented in its hearings does not support the need for transferring such jurisdiction from State regulatory bodies." 104 Cong. Rec. 12533 (1958).

Clearly, Congress specifically intended the Commission to exercise a limited jurisdiction under section 13a(1) only in regard to the discontinuance of particular train or ferry equipment and not including stations, buses or other facilities. Section 13a(1) was meant as a supplement to the Commission's existing authority under section 1(18) of the Act to sanction total abandonment of a particular line of railroad in interstate commerce. In order that a railroad might reduce service without abandoning its entire line, this lesser authority was granted.

While Congress never defined the phrase "operation or service" used in 13a(1) in connection with train or ferry, nevertheless, it can be seen from their deliberations that the legislators never thought it included buses:

"Mr. Avery. . . . It [bill] provides some changes in the jurisdiction of discontinuance or change in operation and service on interstate commerce. Under present law, services and operations are left to the jurisdiction of State regulatory bodies, but the

abandonment of a line lies strictly with the Interstate Commerce Commission . . . the committee bill provides that the railroads may have the Interstate Commerce Commission, rather than a State commission, pass upon the discontinuance or change in service on a rail line. This option to the railroads exists only if the line affected does not exist entirely within a single State." *104 Cong. Rec. 12538 (1958).*

The services and operations just mentioned could easily have been associated with the term "bus" but they were not. This is significant. Evidently Congress made a distinction between operation or service of a train or ferry on the one hand and total abandonment on the other. The discontinuance of the "operation or service of any train or ferry" was to be something less than total abandonment of a line of railroad over which the I. C. C. already had jurisdiction—for example, the curtailment of the single train or ferry, as contrasted with the total abandonment of a line of railroad, which ran in interstate commerce over which the respective states and not the I. C. C. had jurisdiction. This was the only situation that was meant to be remedied by the pending legislation. Moreover, if the line was wholly intrastate, the historical state jurisdiction was not to be disturbed by the bill, except that the I. C. C. would have the right to review state decisions or state inaction.

After the issues in the bill were resolved by the Conference Committee, Senator Magnuson, Chairman of the Senate Committee on Interstate and Foreign Commerce, entered in the Congressional Record an explanation of the results, entitled, "Explanation of S. 3778, The Transportation Act of 1958, as approved by the conferees."

"The section would grant authority to discontinue service rendered by trains and ferries crossing State lines to the Interstate Commerce Commission.

... This provision, however, would not deprive the carrier of the right to go to State Commissions to ask for discontinuance of trains crossing State lines.

"State regulatory commissions would retain jurisdiction over stations, depots, and other such facilities." *104 Cong. Rec. 15527, 8 (1958).*

Thereafter, Senator Smathers, a member of the committee, remarked:

"Mr. Smathers . . . we protected the right of the States . . . by leaving to the State regulatory agencies the right to regulate and have a final decision with respect to the discontinuance of train service which originated and ended within one particular State, except when it could be established that intrastate service was a burden on interstate commerce.

"In addition, the Senate receded on a provision under which we had given the Interstate Commerce Commission jurisdiction also to discontinue service in depots, terminals, and other such facilities in connection with the operation of railroads. We left the matter in the hands of the State regulatory agencies." *104 Cong. Rec. 15528 (1958).*

In sum, every care was taken to preserve states' rights. The jurisdiction relinquished was that over a ferry or train running in interstate commerce—the discontinuance of either constituting something less than a complete abandonment, thereby depriving the I. C. C. of jurisdiction over interstate commerce under pre-existing law, 49 U. S. C. §1(18). The legislation goes no further. Moreover, there was never any doubt in anyone's mind that intrastate train service should remain the province of the respective states.

It is respectfully submitted that a proposition never conceived, debated nor enacted by the Congress (intrastate train service plus interstate bus service equals interstate

(train) should not be grafted onto the statute by construction. For what is really urged by the Appellee herein is the writing of a new law. The proper relief for Appellee under existing law is found under section 13a(2) of the I. C. C. Act which deals with intrastate railroad service. Hence, the lower Court was wrong in upsetting the I. C. C. decision which held that the proposed train discontinuance was wholly intrastate and, thus a matter for the Board.

Conclusion.

The questions presented by this appeal are substantial and of urgent importance to the State of New Jersey and its Board of Public Utility Commissioners. They are also of national importance because of the principles involved and because of the effect of the decision below on the jurisdiction of other states and their respective utility commissions. We respectfully ask that probable jurisdiction be noted. /

Respectfully submitted,

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Dated: May 3, 1962.

Appendix A.

Opinion of the District Court filed December 7,
1961 and reported in 200 F. Supp. 860.

NEW YORK, SUSQUEHANNA & WESTERN RAILROAD COMPANY,
Plaintiff,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE
COMMISSION, STATE OF NEW JERSEY, and BOARD OF
PUBLIC UTILITY COMMISSIONERS OF THE STATE OF
NEW JERSEY,

Defendants.

Civ. A. No. 401-61.

United States District Court
D. New Jersey.

Dec. 7, 1961.

Proceeding for review of denial by Interstate Commerce Commission of railroad's petition for reconsideration of its order dismissing for lack of jurisdiction proceeding instituted by railroad for discontinuance of operation. The three judge District Court, Wortendyke, J. held that Commission, under statute dealing with discontinuance of operation of service of train operating from point in one state to point in another state, had jurisdiction of railroad's proceeding for discontinuance of combination train and bus service furnishing passenger carriage between New York and New Jersey, although all of railroad's tracks were in New Jersey and it contracted with another company for buses to carry passengers from New Jersey to New York.

Reversed.

McLaughlin, Circuit Judge, dissented.

LUM, BIUNNO & TOMPKINS, by VINCENT P. BIUNNO, Newark, N. J., for plaintiff.

DAVID M. SATZ, JR., U. S. Atty., Newark, N. J., by RAYMOND W. YOUNG, Asst. U. S. Atty., North Bergen, N. J., and H. NEIL GARSON, Washington, D. C., for the United States and Interstate Commerce Commission; JOHN H. D. WIGGER, LEE LOEVINGER, C. H. JOHNS, JR., ROBERT W. GINNANE, Washington, D. C., of counsel.

DAVID D. FURMAN, Atty. Gen. of New Jersey, by RICHARD GREEN, Deputy Atty. Gen., for State of New Jersey and Bd. of Public Utility Com'rs.

Before McLAUGHLIN and FORMAN, Circuit Judges, and WORTENDYKE, District Judge.

WORTENDYKE, District Judge.

In this action the plaintiff, Susquehanna, seeks a judgment setting aside two certain "orders" of the Interstate Commerce Commission made on January 18, 1961 and May 10, 1961, respectively.

This Court has jurisdiction by virtue of the provisions of 28 U. S. C. §1336, which is being exercised appropriately as a three-judge court in accordance with the procedure prescribed by §§2321 to 2325 inclusive, and §2284 of the same Title.

The Commission's order of May 10, 1961 was a denial of a petition for reconsideration of its order of January 18, 1961. Thus plaintiff exhausted its administrative remedy before the Commission before coming here. 49 U. S. C. A. §17(9); *United States v. Abilene & Southern Railway Co.*, 1924, 265 U. S. 274, 44 S. Ct. 565, 68 L. Ed. 1016.

Susquehanna operates a line of railroad as a common carrier for the transportation of passengers from Butler, New Jersey, to New York City. For its corporate history, see *In re New York, S. & W. R. Co.*, 3 Cir. 1940, 109 F. 2d 988. The railroad runs three passenger trains in each

direction daily, except Saturdays, Sundays and holidays, during commuters' hours only, and no mail, baggage or express is handled thereon. If the operation of these trains is discontinued, no passenger service will be furnished by the carrier. Each train consists of a single-unit diesel locomotive and a single trailing passenger car, and has a crew consisting of an engineer, a fireman, a conductor and a brakeman. Although its trains do not travel eastwardly of a transfer point in North Bergen, New Jersey, its passengers for and from New York City are transported by bus, via the Lincoln Tunnel beneath the Hudson River, between that transfer point and the bus terminal of the Port of New York Authority at 41st Street and Eighth Avenue, in Manhattan. The buses so employed are owned and operated by Public Service Coordinated Transport, a New Jersey corporation, unaffiliated but under contract with the plaintiff.

Susquehanna emerged from reorganization proceedings under §77 of the Bankruptcy Act, 11 U. S. C. A. §205, in 1953. For the year 1960, the cost of operating the trains which Susquehanna seeks to discontinue, including depreciation of locomotives and cars, is alleged to exceed the revenues therefrom by \$117,214.

The provisions of Part I of the Interstate Commerce Act apply to Susquehanna. Its railroad includes terminal facilities for the transportation of its passengers and such transportation includes a contract bus service as an instrumentality or facility for the carriage of its passengers between its transfer point in New Jersey and its terminal in New York. Such bus transportation must be considered as performed by Susquehanna, and is subject to regulation "in the same manner as, the transportation by railroad . . . to which such (bus) services are incidental." 49 U. S. C. A. §302 (c). See *New York Dock Railway v. Pennsylvania Railroad Co.*, 3 Cir., 1933, 62 F. 2d 1010, cert. den. 289 U. S. 750, 53 S. Ct. 694, 77 L. Ed. 1495; *United States v. Motor Freight Express*, D. C. N. J. 1945, 60 F. Supp. 288. The Interstate Commerce Commission has regulatory jurisdic-

tion over Susquehanna and its contract bus facility despite the fact that the railroad is a New Jersey corporation whose entire trackage is within that State. *Cincinnati, New Orleans & Texas Pacific Railway v. Interstate Commerce Commission*, 1896, 162 U. S. 184, 16 S. Ct. 700, 40 L. Ed. 935; *Interstate Commerce Commission v. Detroit, Grand Haven & Milwaukee Railway Co.*, 1897, 167 U. S. 633, 642, 17 S. Ct. 986, 42 L. Ed. 306. The Commission has recognized and exercised that jurisdiction. See *New York, S. & W. R. Co., Common Carrier Application* (1942) 34 M. C. C. 581; on rehearing (1946) 46 M. C. C. 713. See also *Commutation Fares*, New York, S. & W. R. Co. (1951) 280 I. C. C. 31. In its Local Passenger Tariff S.W. 11, issued September 10, 1960, effective September 21, 1960, under Authority of Special Permission of the Interstate Commerce Commission in Finance Docket No. 20567, New York, Susquehanna & Western Railroad Company—Abandonment of Operation Jersey City, N. J., dated August 8, 1960, plaintiff carrier advertises its fares for passenger transportation throughout its line extending between New York, N. Y., and Butler, N. J.; an aggregate distance of 37.9 miles. Paragraph 11 of the carrier's Rules and Regulations, published in its said Tariff, is captioned, and reads as follows:

“Motor-Coach Terminal Service—New York, N. Y.

“Available only to passengers holding tickets reading as described in paragraph 1 below, upon payment of charge shown in paragraph 2 below:

“1. To or from stations on the New York, Susquehanna and Western Railroad Company, Babbitt, N. J., and stations West thereof, on the one hand, and New York, N. Y., via the Susquehanna Transfer, N. J., on the other.

“2. Motor-coach fare in each direction between North Bergen, N. J. and New York, N. Y. 25 cents.”

Erie's discontinuance of its ferry service pursuant to the provisions of 49 U. S. C. A. §13a(1) had deprived plaintiff of the availability of this ferry service for its passenger transportation into and out of New York City. For background history of the Erie passenger ferry abandonment, see *State of New Jersey et al. v. United States et al.*, D. C. N. J. 1958, 168 F. Supp. 324, aff'd. *Bergen County v. U. S.*, 1959, 359 U. S. 27, 79 S. Ct. 607, 3 L. Ed. 2d 625, reh. den. 359 U. S. 950, 79 S. Ct. 722, 3 L. Ed. 2d 683.

On December 30, 1960 Susquehanna filed with the Interstate Commerce Commission, pursuant to the provisions of section 13a(1) of the Interstate Commerce Act, a Notice that the carrier would discontinue service of all of its passenger trains described as "operating" between Butler, New Jersey and New York City and serving various intermediate stations in New Jersey en route. A copy of plaintiff's Notice was served by mail, on December 29, 1960, upon the Governor of the State of New Jersey, the Secretary of the Board of Public Utility Commissioners of the State of New Jersey, the Governor of the State of New York, the Secretary of the Public Service Commission of the State of New York, the Assistant Postmaster General, and the Railway Labor Executives' Association, and posted in each of Susquehanna's railroad stations, in the Port of New York Authority Bus Terminal in New York City, in each of the motor coaches operated by Public Service Coordinated Transport which carry passengers from and to plaintiff's trains, and in each passenger car of each of those trains.

On January 9, 1961, the State of New Jersey and its Board of Public Utility Commissioners filed a petition with the Interstate Commerce Commission praying that an investigation of plaintiff's proposed train discontinuance be entered upon by the Commission, and that plaintiff's Notice be dismissed without prejudice, upon the ground that its case before the Commission was improperly brought under section 13a(1). To that petition Susquehanna filed an Amended Reply on February 20, 1961, wherein the car-

rier joined issue upon the contentions made in the petition.¹ By order of Division 4 of the Commission, made on January 18, 1961, the proceeding instituted by plaintiff's Notice was dismissed for lack of jurisdiction because the Commission found that each of the trains proposed to be discontinued by the plaintiff operates solely within the State of New Jersey. The Commission concluded that Susquehanna's Notice, was, therefore, improperly filed under section 13a (1) of the Act. On February 20, 1961, the Railroad filed a Petition for Reconsideration of the Commission's order of January 18, 1961. The Petition for Reconsideration was denied by the Commission's order of May 10, 1961.

The Commission's refusal to reconsider its order denying jurisdiction of the proceeding instituted by the plaintiff under section 13a(1) of the Act constitutes a proper basis for the exercise of the jurisdiction of this Court created by 49 U. S. C. A. §17(9) and 28 U. S. C. 1336. The present action presents the single question whether the provisions of section 13a(1) have been appropriately invoked by the plaintiff for the purpose of effecting a discontinuance of its passenger trains enumerated in the Notice filed with the Commission. The position of the defendants in the case is disclosed in their contention that section 13a(1) is applicable only to the discontinuance of "the operation or service of any train or ferry operating from a point in one State to a point in any other State." Because the trains which plaintiff would discontinue do not actually run across the dividing line between New Jersey and New York, but only between points within the State of New Jersey, defendants argue that application for relief before the Interstate Com-

¹ Carrier's amended reply to the petition of the State and Board disclosed that day-to-day counts of interstate and intrastate passengers using each of the trains which carrier desired to discontinue showed the following daily averages:

Train No.	Total	Interstate	Intrastate
908	47.7	39.7	8.0
910	126.4	120.1	6.3
916	112.5	91.2	21.3
919	47.9	31.5	16.4
923	120.1	118.6	1.5
929	37.0	34.5	2.5

merce Commission is governed by subsection 13a(2).² Defendants United States and Interstate Commerce Commission further assert that "the Legislative history of section 13a(1) supports the view that it is intended to allow discontinuance of only trains or ferries, but not of all the rail transportation operation from a point in one State to a point in another State."³ They do not deny that plaintiff

² The Conference Report upon S—3778, 85th Cong. 2d Sess. (2 U. S. Code Cong. & Adm. News 1958, pp. 3456, 3486), has this to say respecting the proposed new section 13a embodied in section 5 of the Bill: "Paragraph (1) deals with the discontinuance or change of the operation or service of a train or ferry—operating from a point in one State to a point in any other State . . . A procedure is set up whereby the carrier or carriers concerned may discontinue or change the operation or service (notwithstanding State law) upon giving 30 days' notice to the Interstate Commerce Commission (as well as certain other notice) of intention to do so.

"Paragraph (2) of the proposed new section 13a. . . . deals with the discontinuance or change, in whole or in part, by a carrier or carriers of the same class referred to in paragraph (1), of the operation or service of any train or ferry operated 'wholly within the boundaries of a single State.' The paragraph would operate where such carrier or carriers desire to discontinue or change any such operation or service, and where (1) the discontinuance or change is prohibited by the constitution or statutes of a State; (2) where the State authority having jurisdiction has denied an application duly filed for authority to discontinue or change the operation or service, or (3) where the State authority having jurisdiction shall not have acted finally on such application within 120 days from the presentation thereof. . . ."

³ If the plaintiff intends to terminate all railroad transportation over its line between Butler, New Jersey and New York City, the Commission would have clear jurisdiction to entertain its application for leave to do so under section 1(18) of the Act. This Court has already stated in *Board of Public Utility Commissioners v. United States*, 1957, 158 F. Supp. 98, at page 100, that "It is equally sound that the Commission possesses the right to allow complete abandonment of a railroad branch line though the latter be located wholly within a state. *State of Colorado v. United States*, 1926, 271 U. S. 153, 46 S. Ct. 452, 70 L. Ed. 878. Under that opinion if the contemplated stoppage of the Weehawken passenger ferry effects the complete abandonment of a line of railroad or portion of a line of railroad, the Commission's action was proper. If it is merely the elimination of part of the service of that line, the Commission has no justification for assuming control of the proceeding." That language was used before the new section 13a became law. We are not here called upon to determine whether the Commission in the present case derives jurisdiction from §1(18).

is an interstate carrier, and they concede that it performs its interstate function in part by the use of the contract bus service into and from New York City.

While the defendants are correct in asserting that the trains which the plaintiff seeks to discontinue *move* exclusively within the State of New Jersey, the interstate *transportation* of passengers which the plaintiff is authorized and required by the Commission to provide (49 U. S. C. A. §1(4)), is achieved only by means of the combined facilities of those trains and of the bus service which complements them. While it is also true that section 13a(1) contains the significant phrase "the operation or service of any train or ferry," referring to the particular transportation which may be discontinued or changed upon compliance with the other provisions of the section, we are unable to agree with the insistence of defendants that the word "operation" must be equated to "movement". There being no provision in the Act which makes such definition mandatory, we are at liberty to apply the ordinary meaning of the term, which, when used intransitively, means to work, act, or function. To strictly construe 13a(1) as applicable only to a train or ferry as an instrumentality of interstate transportation is to disregard other provisions of the statute, and thwart the apparent purpose of the Congress in adopting it. In construing remedial legislation, narrow or limited construction is to be eschewed. Rather, in this field, liberal construction in the light of the prime purpose of the legislation is to be employed. *St. Mary's Sewer Pipe Co. v. Director of U. S. Bureau of Mines*, 3 Cir., 1959, 262 F. 2d 378; citing *Lilly v. Grand Trunk Western R. Co.*, 1943, 317 U. S. 481, 63 S. Ct. 347, 87 L. Ed. 411; *Swinson v. Chicago, St. Paul, M. & O. Ry.*, 1935, 294 U. S. 529, 55 S. Ct. 517, 79 L. Ed. 1941; *Sablowsky v. United States*, 3 Cir., 1938, 101 F. 2d 183. The Act must be read and considered as a whole in the light of national transportation policy. *American Trucking Associations, Inc. v. United States*, D. C. D. C. 1959, 170 F. Supp. 38.

In *Board of Public Utility Commissioners of the State of New Jersey et al. v. United States*, 1957, 158 F. Supp. 98,

this Court held that the proposed discontinuance by the New York Central Railroad Company of its passenger ferries between points in New Jersey and the City of New York would constitute but a partial abandonment of a portion of a line of its railroad, which the Interstate Commerce Commission then had no authority to permit, because 49 U. S. C. A. §1(18) provided only for the abandonment of "all or any portion of a line of railroad." Accordingly, this Court set aside a certificate granted by the Commission, authorizing the railroad to discontinue its passenger service while continuing to transport freight by surface vessel across the Hudson River. In that case the adoption of the Transportation Act of 1958 was foreseen by the Court when it said, at p. 103 of the opinion: "The Congress may in its wisdom decide to grant the requisite authority, although as yet there is no intimation of this from the legislative history, but until such time, the Commission, strictly a creature of its creating statute, is without the power to permit the discontinuance of this partial service." [158 F. Supp. 103.] It is quite obvious that this Court's construction of section 1(18) of the Transportation Act of 1920 emphasized the need of congressional legislation to permit of the very relief which this Court had found unavailable. The answer to that need was ultimately given in section 13a(1) of the Transportation Act of 1958. Accordingly, by invoking the provisions of this newly added section, other railroads successfully achieved the discontinuance of passenger ferry service across the Hudson River, while still continuing to operate as interstate common carriers by rail. (*State of New Jersey et al. v. United States et al.*, supra) It seems to follow inevitably that the contract buses, by means of which plaintiff had been performing its service as an interstate carrier, must be considered, as were the ferry facilities, to constitute a portion of plaintiff's line of railroad within the jurisdiction of the Commission.

The exclusiveness of the Commission's jurisdiction over terminal facilities and interterminal services of interstate carriers was emphasized in *Central Transfer Co. v. Terminal Railroad Association of St. Louis*, 1933, 288 U. S. 469,

53 S. Ct. 444, 77 L. Ed. 899, and in *City of Chicago v. Atchison, T. & S. F. Ry. Co.*, 1958, 357 U. S. 77, 78 S. Ct. 1063, 2 L. Ed. 2d 1174. In the latter case a municipal ordinance required that a motor carrier serving interstate connecting railroads for the transportation of passengers across the City, first obtain a certificate of convenience and necessity from the Commissioner of Licenses, and the approval of the City Council, before it could lawfully engage in that business. The United States Supreme Court held that the Interstate Commerce Act, 49 U. S. C. A. §1 et seq., precluded the City from exercising any veto power over the transfer service when performed by the interstate railroads or by their chosen agents because such service was (p. 86, 78 S. Ct. at p. 1068) "at least authorized, if not actually required, under the Act as a reasonable and proper facility for the interchange of passengers and their baggage between connecting lines," and "§302(c) of the Act provides that motor vehicle transportation between terminals, whether performed by a railroad or by an agent or a contractor of its choosing, shall be regarded as railroad transportation and shall be subject to the same comprehensive scheme of regulation which applies to such transportation." Further, at pp. 87 and 88 of the same opinion, 78 S. Ct. at p. 1069 we find an interpretation of congressional policy in the following language of Mr. Justice Black: "The various provisions set forth above manifest a congressional policy to provide for the smooth, continuous and efficient flow of railroad traffic from State to State subject to federal regulation. In our view it would be inconsistent with this policy if local authorities retained the power to decide whether the railroads or their agents could engage in the interterminal transfer of interstate passengers. . . . National rather than local control of interstate railroad transportation has long been the policy of Congress. It is not at all extraordinary that Congress should extend freedom from local restraints to the movement of interstate traffic between railroad terminals."

In *Transit Commission v. United States*, 1933, 289 U. S. 121, 53 S. Ct. 536, 77 L. Ed. 1075, the language of section

1(18) of the Act was held to apply to a trackage agreement which enabled an interstate carrier to extend its traffic beyond its own terminus over the line and to and from the terminus of another carrier. At page 127 of the opinion in that case, 53 S. Ct. at page 538, the Court states that: "Prior to the Transportation Act, 1920, regulations coincidentally made by federal and state authorities were frequently conflicting, and often the enforcement of state measures interfered with, burdened, and destroyed interstate commerce. Multiple control in respect of matters affecting such transportation has been found detrimental to the public interest as well as to the carriers. Dominant federal action was imperatively called for. * * * (Continuing on p. 128 [53 S. Ct. at p. 538].) * * The Act, including paragraph (18) and related provisions, is construed to make federal authority effective to the full extent that it has been exerted and with a view of eliminating the evils that Congress intended to abate." See also *Southern Railway Co. v. Reid*, 1912, 222 U. S. 424; 32 S. Ct. 140, 56 L. Ed. 257.

All parties concede that the question which we are called upon to answer is whether, under the circumstances disclosed in Susquehanna's petition to the Commission, relief should be afforded under subdivision (1) or under subdivision (2) of section 13a of the Act. Plaintiff has been, and is now discharging its obligation as an interstate railroad common carrier by a combination of train and bus service, furnishing passenger carriage between New York and New Jersey. The bus service complements that of the train; the train service complements that of the bus. In combination the two facilities operate from a point or points in one State to a point in another State. A construction of the language employed in subdivision (1) of section 13a which would involve a divorcement or limitation of the jurisdiction of the Commission, and the intrusion of that of the Board of Public Utility Commissioners over the existing facilities employed by Susquehanna, would preclude the attainment of the objective obviously contemplated by the Congress.

We, therefore, conclude that the Commission had jurisdiction over the proceeding instituted by Susquehanna under the provisions of section 13a(1) and that its order of January 18, 1961 refusing to take jurisdiction thereof was contrary to law, and should be reversed.

McLAUGHLIN, Circuit Judge (dissenting).

Prior to the enactment of Section 13a(1) of the Interstate Commerce Act there was no authority then existing which countenanced abandonment by a carrier of its passenger ferry service between New Jersey and New York. Board of Public Utility Commissioners of New Jersey v. United States, 158 F. Supp. 98 (D. C. N. J. 1957). Thereafter the present Section 13a(1) was added to the Interstate Commerce Act, 49 U. S. C. A. §13a(1), effective August 12, 1958. That specifically gave carriers, subject to the mechanics of the section, the right "*to the discontinuance or change, in whole or in part, of the operation or service of any train or ferry operating from a point in one State to a point in any other State . . .*" (Emphasis supplied.)

There is no denial that the section was directed to a particular train or ferry and the legislative history makes this crystal clear. The section was used almost immediately for its avowed purpose, i. e. to justify the extinguishment of the passenger ferry with which the Board of Public Utility Commissioners, etc. litigation, *supra*, was concerned and of the Erie passenger ferry (also used by complainant). See State of New Jersey v. United States, 168 F. Supp. 324 (D. C. N. J. 1959) (New York Central case); State of New Jersey v. United States (Erie and New York, Susquehanna case), 168 F. Supp. 342 (D. C. N. J. 1959). As finally passed, there was not the slightest idea that §13a(1) could be at all available regarding "any train which operates within a State, whose origin and destination are within the State—that is, any train with intrastate characteristics—together with the facilities used by the train, shall be completely under the authority of the State public utilities commission, and shall not be in any way affected by the language of this

particular proposal, to which the Senator from Georgia objects." Declaration by Senator Smathers, author of the then bill, 104 Cong. Rec. June 11, 1958 p. 10852. At p. 10854 of the same record Senator Smathers stated an underlying principle of the amendment to be that "If a train originates within a State * * * and ends within a State, without crossing a State line, that particular train could be discontinued only with the approval of the State regulatory agency, under the amendment." There was never any change in that fundamental concept, suggested or authorized. Throughout the legislative history it is plain that, aside from a particular train, the only other item to be covered by the amendment was a ferry. Buses were neither mentioned or considered. It definitely was never intended by Senator Smathers that an element foreign to the avowed objective of the legislation be concealed within his frank commitment and urged later as coming under §13a(1). The Interstate Commerce Commission itself, which had so readily acquiesced in the end of the mentioned passenger ferry service between New Jersey and New York, at no time ever attempted to distort the meaning of §13a(1) by construing it as allowing discontinuance of purely intrastate train because buses took passengers from them at the end of the railroad in New Jersey and transported them to New York.

The statute is a lean, lucid law. It cannot be misconstrued as it stands. The majority opinion refuses to take on that impossible task. So it rests its reversal of the Interstate Commerce Commission on the proposition that what the latter does in its decision is "thwart the *apparent* purpose of Congress in adopting it." (Emphasis supplied.) Actually, the true purpose of Congress is expressed in the unmistakable language of §13a(1) itself. That language cannot be wrenched apart to absorb the expedient endeavor to do now what was never contemplated when the amendment was enacted.

It is argued that "bus" must be taken as included in the "service of any train". That cannot conceivably make sense where "ferry", no more or less important in the circum-

stances than "bus", was deliberately and directly named and the phrase "service of any" applied to it exactly as to "train". If §13a(1) had been meant to contain the power to wipe out an entire intrastate railroad passenger service by tying it into the interstate connecting buses, the word "bus" would have been placed in the amendment as was the word "ferry". If that had occurred, in all probability, the amendment would never have passed the Senate. It does seem rather conclusive that all of the legislative history re the amendment, both affirmative and negative, vividly establishes that its language is meaningful and is exactly what was agreed to.

The railroad objects to the definition of a "train" as given by the United States Supreme Court in *United States v. Erie R. R.*, 237 U. S. 402, 407, 35 S. Ct. 621, 624, 59 L. Ed. 1019 (1915), where the Court said that a train " . . . consists of an engine and cars which have been assembled and coupled together for a run or trip along the road." The railroad would put this in the same category as Miss Stein's "a rose is a rose . . ." It might be noted that to date, a rose is still a rose. Also that as far as Section 13a(1) of the Interstate Commerce Act is concerned, within its categorically limited purpose and language, a "bus" is neither " . . . the operation or service of any train or ferry operating from a point in one State to a point in any other State"

For plaintiff to prevail the Interstate Commerce Commission must be held to have grievously erred in law by concluding it had no jurisdiction to permit the railroad to divest itself of its passenger service. Even on this legal question, the Commission's deep, special knowledge of the problem in this case is of the utmost importance. Admittedly it had no right to sanction abandonment of New Jersey—New York harbor ferries until section 13a(1) became the law. Admittedly it was completely familiar with the Smathers bill. It knew that under the resultant amendment to the Act, it was given the power to approve the discontinuance of a single train or ferry. It knew the amendment went no further than that. It knows that the kind of control

involved in this action or otherwise was never sought for the Commission in §13a(1) by complainant, other carriers or anyone else. The Commission therefore rightly refused to accept complainant's present fantastic interpretation of Section 13a(1) proffered, not with any claim that it was ever dreamt of when §13a(1) was passed, but under the transparently unsupportable suggestion that "bus" must be taken as part of §13a(1) since the latter is "remedial legislation". In view of the success in obtaining legislation to do away with the ferries an equivalent result might be obtained as to buses. But meanwhile, the passenger trains, which plaintiff seeks to discontinue, operate solely within the State of New Jersey and the matter of their discontinuance is not within the jurisdiction of the Interstate Commerce Commission.

I would therefore uphold the Commission's dismissal of the proceeding.

Appendix B.

**Final Judgment of the District Court
Dated January 9, 1962.**

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

CIVIL ACTION, No. 401-61:

**NEW YORK, SUSQUEHANNA & WESTERN
RAILROAD COMPANY,**
Plaintiff,

vs.

**UNITED STATES OF AMERICA, INTERSTATE
COMMERCE COMMISSION, STATE OF
NEW JERSEY, and BOARD OF PUBLIC
UTILITY COMMISSIONERS OF THE STATE
OF NEW JERSEY,**
Defendants.

Final Judgment.

This matter having come on for trial in the presence of Lum, Biunno & Tompkins (by Vincent P. Biunno, Esq.), attorneys for plaintiff, David M. Satz, Jr., Esq. (by Raymond A. Young, Esq.), United States Attorney, and H. Neil Garson, Esq., attorneys for the defendants United States of America and Interstate Commerce Commission, with John H. D. Wigger, Esq., Lee Loevinger, Esq., C. H. Johns, Esq., and Robert W. Ginnane, Esq., of Counsel with the defendant United States of America, and David D. Furman, Esq. (by Richard Green, Esq.) Attorney General of the State of New Jersey, attorney for the defendant State of New Jersey and Board of Public Utility Commissioners of the State of New Jersey; and the court having examined and considered the record and order before it, and having

heard and considered the argument and briefs of counsel thereon,

It is, on this 9th day of January, 1962, ORDERED that final judgment be and it hereby is entered, determining that the provisions of section 13a(1) of the Interstate Commerce Act (49. U. S. C. sec. 13a(1)) were appropriately invoked by the plaintiff for the purpose of effecting a discontinuance of its passenger trains enumerated in the Notice filed with the defendant Interstate Commerce Commission; that said Commission had jurisdiction over the proceedings so instituted and that its order of January 18, 1961, under review, was contrary to law and is hereby permanently suspended, enjoined, annulled and set aside;

And good cause appearing it is further ordered that the plaintiff railroad, its officers, agents, servants and attorneys are hereby restrained and enjoined from discontinuing passenger service under its said Notice or under this judgment, until the further order of this Court, pending appeal by the defendants to the Supreme Court of the United States;

W. Jr. without costs.

(s) PHILLIP FORMAN
C. J.

(s) REYNIER J. WORTENDYKE, JR.
D. J.

Circuit Judge Gerald McLaughlin notes his dissent, except as to the foregoing restraint.

Appendix C.

Initial Order of the I. C. C. Dated January 18, 1961, Not Yet Reported, Dismissing for Lack of Jurisdiction the Appellee's Notice Filed December 30, 1960.

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 4, held at its office in Washington, D. C., on the 18th day of January, A. D. 1961.

FINANCE DOCKET No. 21417.

NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY
DISCONTINUANCE OF PASSENGER SERVICE BETWEEN
NEW YORK, N. Y., AND BUTLER, N. J.

IT APPEARING, That on December 30, 1960, the New York, Susquehanna and Western Railroad Company filed with this Commission notices purportedly under section 13a(1) of the Interstate Commerce Act, as amended, that effective January 30, 1961, said carrier will discontinue service of its passenger trains Nos. 908, 910, 916, 919, 923, 929 and 915 allegedly operating between Butler, N. J., and New York, N. Y., serving numerous intermediate stations;

IT FURTHER APPEARING, That by petition filed January 9, 1961, the State of New Jersey and its Board of Public Utilities Commissioners request this Commission to enter upon an investigation of the proposed discontinuance and petitioners move that the instant proceeding be dismissed without prejudice since the trains actually operate between Butler, N. J., and the Susquehanna Transfer, a point also situated within the State of New Jersey, and in view thereof the proposal does not fall within the purview of section 13a(1) of the Interstate Commerce Act since the trains actually operate solely within the State of New Jersey and not "from a point in one State to a point in any other State" as provided by said section 13a(1):

IT FURTHER APPEARING, That each of the trains proposed to be discontinued operate solely within the State of New Jersey and that therefore the said notice filed December 30, 1960, by the New York, Susquehanna and Western Railroad does not constitute a notice properly filed under the provisions of Section 13a(1) of the Interstate Commerce Act;

IT IS ORDERED, That the notice filed December 30, 1960, by the New York, Susquehanna and Western Railroad in the instant proceeding be, and it is hereby, dismissed for lack of jurisdiction.

By the Commission, Division 4.

HAROLD D. MCCOY
Secretary

(SEAL)

Appendix D.

**Order of the I. C. C. Dated May 10, 1961 Denying Appellee's
Motion for Reconsideration of the I. C. C.'s
Order of January 18, 1961.**

At a General Session of the INTERSTATE COMMERCE
COMMISSION, held at its office in Washington, D. C.,
on the 10th day of May, A. D. 1961.

FINANCE DOCKET NO. 21417.

**NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY
DISCONTINUANCE OF PASSENGER SERVICE BETWEEN
NEW YORK, N. Y., AND BUTLER, N. J.**

Upon consideration of (1) the notice and supporting data filed December 30, 1960, by the New York, Susquehanna and Western Railroad Company under section 13a(1) of the Interstate Commerce Act proposing discontinuance of certain passenger trains allegedly operating between Butler, N. J., and New York, N. Y., (2) the order of the Commission, Division 4, dated January 18, 1961, dismissing said notice for lack of jurisdiction, (3) documents dated January 27 and February 17, 1961, by said railroad titled Reply to Petition of State of New Jersey and its Board of Public Utility Commissioners and Request for Extension of Time and Amended Reply, and (4) a petition, filed February 20, 1961, by said railroad requesting reconsideration of the Commission's order dated January 18, 1961; and

IT APPEARING, That a so-called Petition of the State of New Jersey and its Board of Public Utility Commissioners constituted one of approximately 100 protests to the discontinuance proposal of the railroad and was received and treated as such; that the documents filed by New York, Susquehanna and Western Railroad Company titled Reply

and Amended Reply to Petition of the State of New Jersey, etc., constitute a reply to said protest;

IT FURTHER APPEARING, That due and timely execution of the Commission's functions under the provisions of section 13a(1) imperatively require that a decision be reached in respect to a notice filed thereunder prior to the proposed effective date of said notice, and, thus, preclude deferment of a decision awaiting the filing of replies to protests or other pleadings;

IT FURTHER APPEARING, That the material matters set forth in said reply and amended reply have been incorporated in said petition for reconsideration filed February 20, 1961, that said petition has been considered and that no showing has been made warranting reconsideration of the said order of January 18, 1961, dismissing said notice for want of jurisdiction;

IT IS ORDERED, That said petition be, and it is hereby, denied.

By the Commission.

HAROLD D. MCCOY
Secretary

(SEAL)

Appendix E.

§ 13a. Discontinuance or change of the operation or service of trains or ferries; notice; investigation; hearing; determination

(1) A carrier or carriers subject to this chapter, if their rights with respect to the discontinuance or change, in whole or in part, of the operation or service of any train or ferry operating from a point in one State to a point in any other State or in the District of Columbia, or from a point in the District of Columbia to a point in any State, are subject to any provision of the constitution or statutes of any State or any regulation or order of (or are the subject of any proceeding pending before) any court or an administrative or regulatory agency of any State, may, but shall not be required to, file with the Commission, and upon such filing shall mail to the Governor of each State in which such train or ferry is operated, and post in every station, depot or other facility served thereby, notice at least thirty days in advance of any such proposed discontinuance or change. The carrier or carriers filing such notice may discontinue or change any such operation or service pursuant to such notice except as otherwise ordered by the Commission pursuant to this paragraph, the laws or constitution of any State, or the decision or order of, or the pendency of any proceeding before, any court or State authority to the contrary notwithstanding. Upon the filing of such notice the Commission shall have authority during said thirty days' notice period, either upon complaint or upon its own initiative without complaint, to enter upon an investigation of the proposed discontinuance or change. Upon the institution of such investigation, the Commission, by orders served upon the carrier or carriers affected thereby at least ten days prior to the day on which such discontinuance or change would otherwise become effective, may require such train or ferry to be continued in operation or service, in whole or in part, pending hearing and decision in such investigation, but not

for a longer period than four months beyond the date when such discontinuance or change would otherwise have become effective. If, after hearing in such investigation, whether concluded before or after such discontinuance or change has become effective, the Commission finds that the operation or service of such train or ferry is required by public convenience and necessity and will not unduly burden interstate or foreign commerce, the Commission may by order require the continuance or restoration of operation or service of such train or ferry, in whole or in part, for a period not to exceed one year from the date of such order. The provisions of this paragraph shall not supersede the laws of any State or the orders or regulations of any administrative or regulatory body of any State applicable to such discontinuance or change unless notice as in this paragraph provided is filed with the Commission. On the expiration of an order by the Commission after such investigation requiring the continuance or restoration of operation or service, the jurisdiction of any State as to such discontinuance or change shall no longer be superseded unless the procedure provided by this paragraph shall again be invoked by the carrier or carriers.

(2) Where the discontinuance or change, in whole or in part, by a carrier or carriers subject to this chapter, of the operation or service of any train or ferry operated wholly within the boundaries of a single State is prohibited by the constitution or statutes of any State or where the State authority having jurisdiction thereof shall have denied an application or petition duly filed with it by said carrier or carriers for authority to discontinue or change, in whole or in part, the operation or service of any such train or ferry or shall not have acted finally on such an application or petition within one hundred and twenty days from the presentation thereof, such carrier or carriers may petition the Commission for authority to effect such discontinuance or change. The Commission may grant such authority only after full hearing and upon findings by it that (a) the present or future public convenience and necessity permit

of such discontinuance or change, in whole or in part, of the operation or service of such train or ferry, and (b) the continued operation or service of such train or ferry without discontinuance or change, in whole or in part, will constitute an unjust and undue burden upon the interstate operations of such carrier or carriers or upon interstate commerce. When any petition shall be filed with the Commission under the provisions of this paragraph the Commission shall notify the Governor of the State in which such train or ferry is operated at least thirty days in advance of the hearing provided for in this paragraph, and such hearing shall be held by the Commission in the State in which such train or ferry is operated; and the Commission is authorized to avail itself of the cooperation, services, records and facilities of the authorities in such State in the performance of its functions under this paragraph. Feb. 4, 1887, c. 104, Pt. I, § 13a, as added Aug. 12, 1958, Pub. L. 85-625, § 5, 72 Stat. 571.

Office-Supreme Court, U.S.
FILED

MAY 23 1962

JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1961

No. ~~995~~ 1024

STATE OF NEW JERSEY AND BOARD OF PUBLIC
UTILITY COMMISSIONERS OF THE STATE OF
NEW JERSEY,

Appellants,

vs.

NEW YORK, SUSQUEHANNA AND WESTERN RAIL-
ROAD COMPANY, UNITED STATES OF AMERICA
and INTERSTATE COMMERCE COMMISSION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY.

MOTION TO AFFIRM.

VINCENT P. BIUNNO,
CHARLES H. HOENS, Jr.,

*Attorneys for New York, Susquehanna
and Western Railroad Company,
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1961.

No. 937.

STATE OF NEW JERSEY AND BOARD OF PUBLIC UTILITY COM-
MISSIONERS OF THE STATE OF NEW JERSEY;

Appellants,

vs.

NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY,
UNITED STATES OF AMERICA and INTERSTATE COMMERCE
COMMISSION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY.

MOTION TO AFFIRM.

Appellee, New York, Susquehanna and Western Rail-
road Company (hereafter called "Susquehanna"), pursu-
ant to Rule 16 of the Revised Rules of the Supreme Court
of the United States, moves that the final judgment of the
District Court be affirmed on the ground that the questions
are so unsubstantial as not to warrant further argument.

Statement.

In 1953 Susquehanna emerged from a bankruptcy reorganization of 16 years' duration, with capitalization reduced from \$42 million to \$16 million, and fixed interest debt reduced from \$12 million to \$5 million; in approving the plan of reorganization, the I. C. C. estimated that earnings available for interest and other corporate purposes would approximate \$700,000 annually. These earnings were never realized. Its major freight customer, the Ford Motor Company, vacated the Edgewater plant served by Susquehanna and relocated on a highway in Mahwah, N. J. Freight earnings, which had been \$1,148,764 in 1950 declined to a deficit of \$185,045 in 1959. Susquehanna sustained an unbroken line of out-of-pocket losses from passenger operations in every year since emerging from reorganization, and since the end of 1957, freight operations have also been at a deficit.*

In April, 1956, Susquehanna instituted proceedings before appellant Board; extended hearings were not concluded until April, 1957. At that time the New Jersey legislature passed Senate Concurrent Resolution No. 20 (1957) purporting to declare as public policy that abandonment or curtailment of rail passenger service be denied pending receipt of the report of a bi-state Rapid Transit Commission, and the Board ordered further proceedings suspended. The New Jersey Supreme Court held the Concurrent Resolution to be ineffective. (*In re N. Y., Susquehanna and Western R. R. Co.*, 25 N. J. 343, 136 A. 2d 408, decided November 25, 1957), and in December the Board

* All parties certainly know, from the record and from reports filed with them, that from January 1, 1958 to December 31, 1961, passenger out-of-pocket losses totalled over \$900,000, and freight deficits total over \$460,000,* with combined losses exceeding \$1,380,000 (an average of \$345,000 per year, with railway operating revenues for 1961 declined to \$3.6 million, while other income is less than \$50,000).

entered an order permitting some but not all of the curtailment sought. Susquehanna appealed, and after some seventeen months secured further relief from the Appellate Division of Superior Court (*Susquehanna, etc. Ass'n v. P. U. C.*, 55 N. J. Super. 377, 151 A.2d 9, decided May 1, 1959). An unnecessary loss of nearly half a million dollars, caused by the forced continuance of trains ultimately found not to be required, was suffered as a result of this delay.

By the end of 1960, Susquehanna's passenger train service consisted of three commuter trains eastbound in the morning, and three westbound in the evening. Each train consisted of a diesel engine and one passenger car. For the year 1960, this operation involved an above-the-rail cost of some \$117,000 (crew wages alone being over \$100,000), while total passenger revenue was only \$65,000.*

As shown by its suburban time table, these trains carry passengers between various New Jersey points (Butler, N. J. being the most westerly, 37.9 miles from New York) and the Port Authority Bus Terminal at 41st St., New York City. Physically, the eastbound passengers leave the trains at Susquehanna Transfer (a transfer point and not a station, no tickets being sold to or from that point) and from there are transferred to the 41st St. Bus Terminal on special contract buses, operated exclusively for Susquehanna's passengers. The westbound routine is the same: train passengers only may board the transfer bus at the Bus Terminal and are taken to Susquehanna Transfer where they board the train. The buses connect with the trains in both directions. Susquehanna passengers at Susquehanna Transfer have no option to go anywhere except on the transfer bus eastbound and on the connecting train westbound; there are no other authorized entrances or exits to or from Susquehanna Transfer.

* For 1961, the passenger out-of-pocket loss was \$147,292, while crew wages rose to over \$110,000 and passenger revenue declined to \$59,000.

As is clear from the footnote to the majority opinion. Below, Susquehanna carries nearly all its passengers to and from New York City.*

On December 29 and 30, 1960, Susquehanna posted, and on December 30, 1960, served and filed notices complying with section 13a(1) of the Interstate Commerce Act (hereafter designated the "Act"), announcing that the trains mentioned would be discontinued at 12:01 A. M., January 30, 1961. It also filed with the I. C. C. a detailed Statement, as required by its rules, setting out all pertinent facts, including those set out above.

On January 9, 1960, appellants State and Board filed a Petition to Dismiss for asserted lack of jurisdiction, and on January 18, 1960, without awaiting the expiration of the 20 day period allowed by I. C. C. rules for the filing of a Reply by Susquehanna, the I. C. C. entered an order of dismissal. Susquehanna nonetheless filed its Reply within the proper time, and thereafter an Amended Reply as well as a Petition for Reconsideration, which the State and Board opposed. Upon denial of that Petition, the suit below was promptly initiated.

At the trial below, appellees the United States and the I. C. C. explicitly recognized that Susquehanna's passenger service between New Jersey and New York constitutes "interstate rail transportation"; appellants State and Board were silent on the point in their brief, and when questioned conceded that their position in that regard was the same as that of the United States and the I. C. C.

The decision of the District Court was based on the obviously interstate nature of the passenger service involved,

* The table there given works out to an average daily total of 245.8 passengers (who make 2 trips each day, one eastbound and one westbound), of which only 28 travel intrastate. The most heavily patronized eastbound train, No. 910, with 126.4 average daily passengers carries only 6.3 passengers intrastate; and the most heavily patronized westbound train, No. 923, with 120.1 average daily passengers, carries only 1.5 passengers intrastate.

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especially in light of earlier determinations by the J. V. C., to which appellants State and Board were parties, holding that when Susquehanna's trains are at Susquehanna Transfer, they are within the carrier's terminal area at New York; that the transfer of passengers between that point and the 41st Street Bus Terminal, by special contract bus, is an intraterminal transfer, is required by the Act to be considered as performed by Susquehanna, and is to be regarded and regulated as rail transportation. This statutory scheme, expressed in section 202(c) of the Act (49 U. S. C. A. section 302(c)) was in effect and doubtless known to Congress when it enacted the 1958 Transportation Act which included the provisions now referred to as section 13a of the Act. The majority found that both factually and as a matter of law, the specific train-bus arrangement in this case was a single, integrated service, the transfer within the terminal area being incidental to and part of the rail service. The majority opinion also rested on the entire history which led to the enactment of section 13a, and held that it was to be read as remedial legislation, and not with unreasonable narrowness and strictness.

The dissenting opinion adopted the position taken by appellants State and Board, looking at the single word, "train", and giving no effect to the whole phrase: "the discontinuance or change . . . of the operation or service of any train . . ."

The defendants United States and the Interstate Commerce Commission were parties below. They did not appeal from the judgment and obviously are appellees, though not so noted on the Statement of appellants State and Board.

Susquehanna filed a cross-appeal from that part of the judgment which compelled it to continue operating the trains pending this appeal, without requiring bond or other indemnity against loss, or other appropriate terms and conditions. The time for docketing the cross-appeal has been extended pending disposition of this motion,

since its prosecution will be unnecessary unless probable jurisdiction is noted.

ARGUMENT.

The question advanced by appellants State and Board is not substantial, and the decision of the District Court is fully consistent with related decisions and applicable law.

Prior to the enactment of the Transportation Act of 1958, the line of demarcation between Federal and State authority was that (a) if a carrier by rail wished to discontinue all operations on a line of railroad or on part of such line (i. e., an abandonment), sole authority to pass on the proposal was vested in the I. C. C., under sec. 1(18) of the Act, and this exclusive jurisdiction existed without regard to whether the line or portion of a line was interstate or intrastate; and (b) if a carrier by rail wished to discontinue or change the operation or service of one or more trains, but proposed to continue other operations (i. e., a curtailment of service), sole authority to pass on the proposal was vested in the state regulatory agencies, and where the service to be affected was interstate, approval had to be obtained from the regulatory agency of every state involved. This pattern is clearly described in *Board of Public Utility Commissioners v. United States*, 158 F. Supp. 98 (D. N. J. 1957).

Under the law as it then stood, Susquehanna would have had to secure permission from the regulatory agencies of both New Jersey and New York in order to discontinue the rail passenger service between Butler, N. J., and New York which is here involved.

This pattern of jurisdiction was altered by the enactment of section 13a of the Act by the Transportation Act of 1958. The reasons for its enactment are succinctly expressed in the legislative history of the House bill: "Be-

cause of this delay in authorizing, or absolute refusal to authorize, discontinuance of little-used services, it is proposed to add a new section 13a to the act, whereby the railroads, at their option, may have the Interstate Commerce Commission, rather than the State commissions, pass upon the discontinuance or change in the operation or service of any train or ferry. This option is limited, however, to the operation or service of a train or ferry on a line of railroad not located wholly within a single State. This limitation is contained in the bill being reported because the committee feels that the record at this time does not support the broader change in venue, requested by the railroads, which would have covered Interstate Commerce Commission jurisdiction also over operations more local in character, such as those of a branch line or other line of railroad located solely within one State." *House Report No. 1922, 85th Congress, Second Session, 1958 U. S. Code Congressional and Administrative News*, pp. 3456, 3468.

During Senate debate on a proposed amendment which culminated in the division of section 13a into paragraphs (1) and (2), it was made thoroughly clear that the word "train" carried with it all of the accoutrements, all of the "facilities"—and specifically the "terminals"—of a train. The discussion makes it explicit that only when both the train and its facilities (i. e., terminals) are wholly intrastate, 13a(2) applies; but that if either be interstate, 13a(1) applies.*

* Senator Smathers made it clear that the new law would leave to State agencies "any train having its origin and destination in the same State, together with the facilities—specifically the terminals—serving that particular train." Senator Russell noted that the language referred "to the train", and Senator Smathers replied that it also applied "to the facilities which serve the train." Pressing further, Senator Russell asked: "Facilities which are wholly intrastate in character?" and the reply was, "That is correct." Then, answering questions from Senator Kuchel, Senator Smathers said, "We give authority to the Interstate Commerce Commission only over interstate commerce trains. We more clearly define that the [State] public utilities commission has authority over completely intrastate trains and facilities." *Sen. Debate, June 11, 1958, 104 Cong. Record 10852-10853.*

In earlier I. C. C. proceedings dealing with the operation here involved, and to which both Susquehanna and appellants State and Board were parties, it was decided that (a) Susquehanna has long served Manhattan from New Jersey points both in freight and passenger rail service; (b) when Susquehanna's trains arrive at North Bergen (where the Transfer is located), they have entered Susquehanna's terminal area at New York; and (c) the transfer of Susquehanna passengers between Susquehanna Transfer and the 41st St. Terminal is an intraterminal transfer coming within section 202(e) of the Act. These determinations appear in *New York S. & W. R. Co. Common Carrier Application*, 34 M. C. C. 581, at 583, 585 and 586 (1942), on rehearing 46 M. C. C. 713 at 718-19 and 723-4 (1946), as well as in *Commutation Fares, New York, S. & W. R. Co.*, 280 I. C. C. 31, at 34 (1951).

None of these determinations were ever challenged or made the subject of review proceedings, and appellants State and Board are bound thereby.

By virtue of section 202(e) of the Act, the intraterminal transfer operation must be regarded, in contemplation of law, as a train operation and it must be regulated in the same fashion.

This conclusion and result is fully consistent with the treatment of the terminal problem in the Port of New York area, dealt with in the New York Dock case, *New York Dock Railway v. Pennsylvania Railroad Co.*, 62 F. 2d 1010 (C. A. 3d, 1933), cert. den. 289 U. S. 750, 53 S. Ct. 694, 77 L. ed. 1495. And see, also, *United States v. Elgen*, 98 F. 2d 264 (C. A. D. C. 1938), noting the long recognized terminal arrangement in the New York metropolitan area.

The interstate nature of transportation, despite the physical limitations compelling the changing of specific vehicles has also been recognized in *United States v. Capital Transit Co.*, 325 U. S. 357, 65 S. Ct. 1176, 89 L. ed. 1663 (1945).

Nor is this treatment unique to railroads. Interterminal and intraterminal movements by motor vehicles, in order to connect with airports, have similarly been held to be "air transportation." *City of Philadelphia v. Civil Aeronautics Board*, 289 F. 2d 770 (C. A. D. C. 1961).

Arlington & F. A. R. Co., 228 I. C. C. 479 (1938), relied on by appellants State and Board below but not cited in their Statement, is not to the contrary. Section 202(c) of the Act, which controls this case, was not enacted until September 18, 1940, two years later (see 54 Stat. 920, 49 U. S. C. sec. 302). In addition, in *United States v. Elgen*, *supra*, which preceded *Arlington*, the court noted the factual differences which distinguished the long standing recognition that New York City was the terminal of the railroads which came up to the west bank of the Hudson River, and that their river crossing were functionally and legally the equivalent of tracks to the New York City terminal.

The two sets of *Ferry* cases, one before and the other after the enactment of section 13a(1), fully support the decision below. The first set of cases, *Board of Public Utility Commissioners v. United States*, (two cases) 158 F. Supp. 98 and 104 (D. N. J. 1957), prob. juris. noted 357 U. S. 917, 78 S. Ct. 1358, 1359, 2 L. ed. 2d 1361, 1362 (1957), dismissed as moot, 359 U. S. 957 and 982, 79 S. Ct. 795 and 939, 3 L. ed. 2d 765 and 932 (1959), held that from a functional standpoint the specific means used to cross the Hudson River was not significant, and that whether there be ferries or barges or a bridge or a tunnel, and whether they went to different parts of New York City did not justify differentiation between them as there was but a single line of railroad between the two States. In the second set of cases, *State of New Jersey, et al. v. United States, et al.* (two cases), 168 F. Supp. 324 and 342 (D. C. N. J. 1938), *aff'd* 359 U. S. 27, 79 S. Ct. 603 and 607, 3 L. ed. 2d 625, reh. den. 359 U. S. 950, 79 S. Ct. 722, 3 L. ed. 2d 683 (1959), the court observed that since the first decision "Congress

has been heard from most emphatically and distinctly upon the subject", and ruled that under the new statute a railroad, of its own initiative and without any prior authorization, might discontinue a ferry "or any portion of its service operated in interstate commerce" on the expiration of the thirty day period after filing, serving and posting of notice.

The facts here are undisputed; all are set out in full in Susquehanna's formal and detailed Statement filed with the I. C. C., the recitals therein being directed under the General Rules of Practice of the I. C. C., sec. 1.14, to "constitute evidence and be a part of the record", and none of these facts were "specifically denied in a counterpleading," nor was cross examination requested.

The theory advanced by appellants State and Board leads to an absurd result. If one thing is clear, it is that between paragraphs (1) and (2) of Section 13a, Congress intended to encompass all possible circumstances of interstate and intrastate rail transportation. In contending that Susquehanna should have proceeded under section 13a(2) they display the error of the argument advanced for that paragraph, like paragraph (1), employs the identical language "the operation or service of any train or ferry", and by their own interpretation could not embrace the operation of the shuttle bus.*

The question sought to be raised is not substantial and the effort merely represents an attempt by a single State to force indirectly the continuance of an interstate operation, an objective it cannot accomplish directly. *Erie R.R. v. State*, 51 N. J. Super. 61, 143 A. 2d 224 (App. 1958), grounded on *Pennsylvania R. Co. v. P. U. C.*, 11 N. J. 43, 93

* Appellants State and Board have refused to authorize a request made by Susquehanna a year ago, for entry of a consent order allowing it to participate in hearings before appellant Board without thereby prejudicing its claim of right to discontinue under the 13a(1) notices. This refusal has precluded the conduct of proceedings under 13a(2) on a provisional basis, thus exposing Susquehanna to the risk of unconscionable delay.

A. 2d 339 (1952), which in turn rests on *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565 (1877). Both Susquehanna and appellants State and Board were parties to that action.

The insubstantiality of the question is emphasized by the unsupportable examples of supposedly "intrastate" operations of other carriers which appellants argue would be affected by the decision below.

None of these operations by other carriers are in the record and the facts regarding them were never before the District Court.

But beyond that, appellants State and Board must know, and can hardly deny that:

1. proceedings involving 18 interstate trains between Philadelphia and southern New Jersey points were initiated under section 13a(1) and by I. C. C. order dated April 4, 1962, the service was ordered continued for one year. (I. C. C. Finance Docket No. 21606, not yet reported);

2. proceedings for discontinuance of 30 trains between Camden, N. J. and various southern New Jersey points were conducted under section 13a(2), the carriers having recognized them as intrastate trains (no interstate river crossing service being provided by the carriers as an integral part of the service of these trains), and by the same order the petition for discontinuance was denied (I. C. C. Finance Docket No. 21607, not yet reported);

3. there is perhaps one, and at most two trains, of the Pennsylvania whose service terminates at Newark; all other trains continue by tunnel to New York. These interstate trains are hardly rendered intrastate, merely because some passengers do not go beyond Newark or choose other means to go to New York;

4. the Erie-Lackawanna and Central of New Jersey operations, if within section 13a(1), would be covered by

that provision even by the narrow and strained construction of appellants State and Board, since the service obviously involves a "train" and a "ferry". The decision here can hardly affect the status of those trains;

5. the Pennsylvania, the Erie-Lackawanna and the Central of New Jersey together receive the great bulk of the annual subsidy of about \$6 million provided by appellant State under contracts pursuant to N. J. P. L. 1960, ch. 66 (N. J. S. A. 48:12A-1 through 16), which require that no proceedings for discontinuance or curtailment may be taken or prosecuted without permission of appellant State. N. J. P. L. 1960, ch. 66, sec. 5 (N. J. S. A. 48:12A-5).*

Hence the purported concern about the effect of the decision on train operations elsewhere in New Jersey and performed by other carriers is imaginary and without substance.

Whether a given train of some other railroad is interstate or intrastate, so as to come within 13a(1) or 13a(2), is a fact question to be settled according to the circumstances of each case, and cannot be affected by the unique facts of the present case.

Lastly, it is observed that the question is insubstantial because it cannot affect the ultimate outcome. The undisputed record shows that the trains involved are but lightly patronized, that there is alternate public transportation by other means, that Susquehanna suffers an operating deficit on both passenger and freight operations such that continuance of the operation is an undue burden on interstate commerce. Forced continuance would be a deprivation of prop-

* Another agency of appellant State, the Division of Railroad Transportation, after hearings, ruled in April, 1962, that Susquehanna's present passenger service is so inadequate that it should receive no financial aid from the State this despite the fact that the reduction to the present schedule was pursuant to the order of appellant Board. The formula for financial aid includes no factors to compensate for cost, losses or need.

erty without due process of law. *Peñna-Reading Seashore Lines v. P.R.C.*, 5 N. J. 114, 74 A. 2d 265 (1950).

Appellants State and Board still have open to them, under section 13a(1), the avenue of requesting a hearing by the I. C. C.; in which they will have the opportunity to establish, if they can, that the service is required by public convenience and necessity and that its continuance will not unduly burden interstate commerce. Upon such showing, the I. C. C. is empowered to order a continuation of service for one year.

It is beyond dispute by any party that: (a) Susquehanna Terminal is within the carrier's terminal area at New York; (b) that the transport of passengers by special contract bus is an intraterminal transfer, so decided by the I. C. C. in the proceedings cited, coming within section 202(c) of the Act; (c) that nearly all the passengers are carried by Susquehanna between New Jersey points and New York; (d) that there are few passengers and these have alternate means of public transportation; and (e) that the unbroken losses from freight as well as passenger operations impose an unreasonable burden on interstate commerce and seriously jeopardize the ability of Susquehanna to perform any function at all.

We respectfully submit, therefore, that the appellants present no substantial question for the decision of this Court, and that the judgment of the District Court should be affirmed.

Respectfully submitted,

VINCENT P. BIUNNO,
CHARLES H. HOESS, JR.,
Counsel for Appellee,
New York, Susquehanna and
Western Railroad Company.

Dated: May , 1962.

Office Memorandum, U.S.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 937

STATE OF NEW JERSEY AND BOARD OF PUBLIC UTILITY
COMMISSIONERS OF THE STATE OF NEW JERSEY,
APPELLANTS

v.

NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD
COMPANY, UNITED STATES OF AMERICA AND INTER-
STATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF NEW JERSEY

MEMORANDUM ON BEHALF OF THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

The United States and the Interstate Commerce Commission did not appeal from the decision below because we were not convinced that the questions presented were of sufficient importance to warrant our seeking review by this Court. We were persuaded principally by the consideration that the factual situation involved appears to be an unusual one. We wish to advise the Court, however, that we share the view of the State of New Jersey and its Board of Public Utility Commissioners that the court below is clearly in error.

The question presented is whether the New York, Susquehanna and Western Railroad Company (Susquehanna) must follow the procedure set forth in Section 13a(1) of the Interstate Commerce Act,¹ as the court below held, or that set forth in Section 13a(2) of the Act, in seeking to discontinue three commuter passenger trains. The trains operate between points in New Jersey and Susquehanna Transfer, New Jersey, at which point passengers transfer to or from New York City via a reserved bus operated by an independent motor carrier under contract with Susquehanna. The procedure set forth in Section 13a(1) governs "the discontinuance * * * of the operation or service of any train or ferry operating from a point in one State to a point in any other State" (J.S. 45) whereas Section 13a(2) governs "the discontinuance * * * of the operation or service of any train or ferry operated wholly within the boundaries of a single State" (J.S. 46).

The practical consequences of the lower court's decision that Section 13a(1) applies (J.S. 24) are that Susquehanna may discontinue the trains by filing and posting 30-day notices, unless the Commission institutes an investigation during that period, pending completion of which the Commission may also require continuance of the trains for not more than four months; and upon completion of such investigation, the Commission may, upon appropriate findings, order continuance of the service for a year. The Commission's view is that the applicable procedure is pre-

¹ Section 13a of the Act (49 U.S.C. 13a) is set forth in Appendix E to the Jurisdictional Statement at pp. 45-47.

scribed in Section 13a(2), which requires resort first to state authorities: before applying to the Commission the carrier must establish that a State commission has refused to authorize such discontinuance, or has failed to act upon a petition for discontinuance pending for 120 days; thereupon the Commission may authorize such discontinuance "*only* after full hearing" (J.S. 46, emphasis supplied).

Sections 13a(1) and 13a(2) were enacted in 1958 to give the Interstate Commerce Commission power to authorize railroads to discontinue or reduce particular services, e.g., passenger service, as distinguished from the total abandonment of a line pursuant to Section 1(18) of the Act. The Commission's ultimate power to authorize discontinuance exists under both Section 13a(1) and 13a(2), although the procedures are different in that Section 13a(2) provides a more effective means for the protection of state interests.

Since the trains of Susquehanna operate wholly within New Jersey (J.S. 26), we believe that the lower court was in error when it decided that the interstate character of the passengers' journey permitted the railroad to avoid the procedure of Section 13a(2), and thus to avoid an initial application to state authorities. The language of the statute requires that Section 13a(1) be utilized for an interstate train, and Section 13a(2) for an intrastate train, even though both trains are engaged in transporting passengers in interstate commerce.

Congress selected a "train or ferry" as the specific units which might be discontinued under Section

13a(1), and these are precise physical units distinguishable from the broad terms "railroad" or "transportation" (cf. Section 1(3)(a) of the Act). This distinction was critical in the evolution of Section 13a. The original bill permitted "discontinuance * * * of the operation or service of any train or ferry engaged in the transportation of passengers or property in interstate, foreign, and intrastate commerce * * * or of the operation or service of any station, depot, or other facility" (S. 3778), but the bill as enacted applies only to "the operation or service of any train or ferry." These changes reflect in part the opposition to the original bill by Senator Russell, who characterized it as a most "forthright assault upon the right of local self-government and the rights of States" (104 Cong. Rec. 10850. See also 104 Cong. Rec. 10853-54, 12542, 12530.) The Senate subsequently adopted an amendment to Section 13a so that it would cover "any train or ferry engaged in the transportation of passengers or property in interstate or foreign commerce" (104 Cong. Rec. 10849-10850, 10866). That language would still have permitted the result reached by the court below, and indeed would have left very few train services subject to State jurisdiction. As the bill emerged from conference, however, it contained the present language which seems clearly to reflect the views expressed by Senator Smathers, who proposed that State jurisdiction be preserved over "any train which operates within a State, whose origin and destination are within the State—that is, any train with intrastate characteristics—together with the facilities used by the train" (104 Cong. Rec. 10852).

As the dissent of Circuit Judge McLaughlin points out below (J.S. 35), Section 13a(1) was used immediately upon enactment to accomplish the discontinuance of passenger ferry service of the New York Central and the Erie between New Jersey and New York. *New Jersey v. United States*, 168 F. Supp. 324 (D.N.J.), affirmed, 359 U.S. 27, *New Jersey v. United States*, 168 F. Supp. 342 (D.N.J.), consistent with the express inclusion of the word "ferry" in Section 13a(1). But in the present matter it is the bus which crosses the state line; a "bus" is an instrumentality no less distinctive than a "train" or a "ferry"; and:

If § 13a(1) had been meant to contain the power to wipe out an entire intrastate rail-road passenger service by tying it into the interstate connecting buses, the word "bus" would have been placed in the amendment as was the word "ferry". [J.S. 37.]

The lower court sought to overcome this impediment to Susquehanna's position by deciding that the (interstate) bus was a "service" of the train (J.S. 34). It seems clear, however, that Section 13a distinguishes between a "train or ferry" which crosses a state line, and one which does not, regardless of connecting facilities for the effectuation of interstate transportation, and that to add a "bus" to a "train" as the "service" of that train, so as to make of it a train operating between states, is contrary to the language of the statute.

For the foregoing reasons the United States and the Interstate Commerce Commission believe that the district court was in error in adjudging that the

provisions of Section 13a(1) of the Act were appropriately invoked by Susquehanna, and in setting aside the Commission order of January 18, 1961 which dismissed for lack of jurisdiction the proceedings instituted by Susquehanna with the Commission.

Respectfully submitted.

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JUNE 1962.

JUN 11 1962

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 227.

STATE OF NEW JERSEY AND BOARD OF PUBLIC
UTILITY COMMISSIONERS OF THE STATE OF
NEW JERSEY,

Appellants,

vs.

NEW YORK, SUSQUEHANNA AND WESTERN
RAILROAD COMPANY,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY.

**BRIEF OF APPELLANTS IN OPPOSITION TO
APPELLEE'S MOTION TO AFFIRM.**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1961.

No. 937.

STATE OF NEW JERSEY AND BOARD OF PUBLIC
UTILITY COMMISSIONERS OF THE STATE OF
NEW JERSEY,

Appellants,

vs.

NEW YORK, SUSQUEHANNA AND WESTERN
RAILROAD COMPANY,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY.

**BRIEF OF APPELLANTS IN OPPOSITION TO
APPELLEE'S MOTION TO AFFIRM.**

Foreword.

This brief, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, is filed in opposition to the motion of the New York, Susquehanna and Western Railroad Company (hereinafter sometimes called "Appellee") which seeks to affirm the final judgment of

the statutorily constituted United States District Court of three judges entered on the docket January 11, 1962, and reported in 200 Federal Supplement at page 860.

Appellants' Statement ~~as~~ to Jurisdiction filed herein sets forth the basis of this Court's jurisdiction to entertain this appeal, the statement of the case and a statement of the questions presented by this appeal.

Appellee contends that the questions presented by this appeal are so unsubstantial as not to warrant further argument and therefore the judgment of the District Court should be affirmed.

Statement of the Case.

In accord with Rule 40(3), (4), of Revised Rules of this Court, the Appellants submit the following facts to correct an inaccuracy in the statement portion of Appellee's motion to affirm. On page 3 of its statement, Appellee, in referring to the Public Service Coordinated Transport bus service from Susquehanna Transfer, North Bergen, New Jersey, to the Port Authority Terminal in New York City and vice versa, states that the buses are "special contract buses operated *exclusively* for Susquehanna's passengers." (Emphasis added.) This is not so because the bus service is also available to the Erie-Lackawanna Railroad train passengers using the eastbound morning train No. 1202 from Nyack, New York, to Hoboken, New Jersey, or the westbound evening train No. 1203 from Hoboken, New Jersey, to Nyack, New York. Both of these Erie-Lackawanna trains stop at Susquehanna Transfer in North Bergen, New Jersey, to enable passengers from train No.

1202 to board the same bus used by the Appellee's passengers bound for the Port of New York Authority Bus Terminal. On the reverse movement passengers for Erie-Lackawanna train No. 1203 may board the same bus used by Susquehanna passengers at the Port of New York Authority Bus Terminal and connect with Erie-Lackawanna train No. 1203 at Susquehanna Transfer.

Because the Appellants had no knowledge that the United States and the Interstate Commerce Commission (hereinafter sometimes called "I. C. C.") would appeal herein, they made no note of the point. It was presumptuous of Appellee to assume that the United States and the I. C. C., whose decision is the subject of this appeal and who both opposed Appellee in the court below as defendants, are now Appellees on the side of Appellee. On the contrary, it is evident that the I. C. C. has not adopted the opinion of the court below in view of its decision in *Pennsylvania-Reading Seashore Lines discontinuance case (Pennsylvania Railroad Company and Pennsylvania-Reading Seashore Lines, Discontinuance of Passenger Train Service*, Finance Docket Nos. 21606 and 21607, I. C. C., April 4, 1962, not yet reported). The decision of the court which is the subject of this appeal was not cited as authority by the Interstate Commerce Commission even though there was a motion to dismiss the proceedings on jurisdictional grounds. There the rail operations consisted of intrastate and interstate transportation. A petition for discontinuance of all train service was brought before the Board of Public Utility Commissioners of the State of New Jersey (hereinafter referred to as "Board") and was denied but some relief was granted by the Board in permitting a reduced schedule. Thereafter, the carriers petitioned before the I. C. C. for a discontinu-

ance under both 49 U. S. C. 13a(1) and (2). The I. C. C., in effect, upheld the Board and did not permit a further reduction of service. The case did involve intrastate trains with integral interstate river crossings. For instance, an intrastate train from Cape May, New Jersey, to Camden, New Jersey, connects at Haddonfield, New Jersey, with an Atlantic City-Philadelphia train for an interstate connection. In like manner, an interstate train from Philadelphia, Pennsylvania, to Atlantic City, New Jersey, connects at Haddonfield with an intrastate train from Camden, New Jersey, to Cape May, New Jersey. The Appellee's conception of the facts in its argument at page 11 is that no intrastate train connects with an interstate service which continues across a body of water into another state. This statement by the Appellee is therefore inaccurate.

The District Court proceeded properly in ordering the continuance of the Appellee's train service, pending appeal to this Court, without requiring a bond from the defendants in the court below. The precedents for this action were two preliminary injunction orders entered by the United States District Court for the District of New Jersey, in *Board of Public Utility Commissioners et al. vs. New York Central et als.*, Docket No. CI 559-57, and *Board of Public Utility Commissioners vs. Interstate Commerce Commission et al.*, Docket No. 802-57 (Preliminary Injunctive Orders not reported). The issue of an injunctive bond was briefed, argued and the court in both instances construed Rule 65(c) of the Federal Rules of Civil Procedure as exempting the moving parties (Appellants herein). The arguments against the bond were (1) that the Appellants were prohibited from giving bond by Article 8, section 2, paragraph 1, of the New Jersey Constitution, and (2) that

the giving of security was not mandatory upon the court and, therefore, in its discretion, the court could grant an injunction without a bond where the public interest was involved.

Appellee's "time for docketing its cross-appeal has been extended pending disposition of this motion, since its prosecution will be unnecessary unless probable jurisdiction is noted." (Pages 5, 6 of Appellee's motion to affirm.) However, should this Court enter an order of reversal, pursuant to its Rule 16(4), before Appellee docket its cross-appeal and before oral argument, it will also be unnecessary then for Appellee to perfect its cross-appeal.

At page 4 of the statement, reference is made to a footnote which purports to show the number of passengers carried. This is based upon a self-serving affidavit of an employee of the Appellee and the information has not been subjected to cross examination to test its validity. Similarly, at pages 2 and 3 in the footnotes there is reference to monetary losses. This also is based upon self-serving affidavits, which have not been subjected to cross examination.

ARGUMENT.

POINT 1.

The issues before this Court do not concern "terminals" or "buses" but only a "train" or "ferry" because the statute involved is 49 U. S. C. 13a(1) and not section 202(c) of the Interstate Commerce Act (49 U. S. C. 302(c)).

Neither the I. C. C. order of January 18, 1961, nor its order of May 10, 1961, speaks of section 202(c) of the In-

terstate Commerce Act or of terminal areas, even though the I. C. C. was most familiar with its prior decisions (cited by Appellee in its motion to affirm) relating to terminal facilities. Because the Appellee filed passenger train discontinuance notices under section 13a(1) of the Interstate Commerce Act, the I. C. C. properly addressed itself to that law. When the I. C. C., in its first order, found that it was without jurisdiction, the basis of such action was that "each of the trains proposed to be discontinued operate solely within the State of New Jersey and that therefore the said notice filed December 30, 1960, by the New York, Susquehanna and Western Railroad does not constitute a notice properly filed under the provisions of section 13a(1) of the Interstate Commerce Act." The I. C. C. was well aware of the fact that even though terminals were discussed when section 13a was being debated in Congress, the law as enacted limited the I. C. C. jurisdiction to a "train" or "ferry" and did not include terminals or integral parts of terminals. No public body was more concerned or more familiar with the subject matter than the I. C. C., whose administrative interpretation of the statute is entitled to great weight.

In its argument the Appellee continues to misinterpret section 13a and attempts to broaden it to include discontinuance of terminals. This appears to be the cause of the error in the court below, where the court looked at the passengers and the tickets rather than the vehicle. Now the Appellee seeks to have this Court look at the terminal rather than the vehicle. The fact is that the statute is limited by its terms to "discontinuance or change, in whole or in part, of the operation or service of any train or ferry." This Court has held that a train is no more or less than an engine and cars assembled together.

United States v. Erie R. Co., 237 U. S. 402 (1915). Furthermore, the I. C. C., in *Arlington & F. A. R. Co.*, 228 I. C. C. 479 (1938), stated that auto-rail cars, operating within one state as rail cars but converting to auto cars and then crossing the state line into another state, were not an extension of a line of railroad but merely an extension of transportation service. Supporting this proposition that an extension of a line of railroad denotes strictly an extension of the tracks or of the physical facilities that are themselves essential to the operation of a railroad, the I. C. C. cited two decisions of this Court: *Texas & P. Ry. Co. v. Gulf, C. & S. F. Ry. Co.*, 270 U. S. 266 (1926) and *Railroad Commission of California v. Southern Pac. Co.*, 264 U. S. 331 (1924). The case of *New York Dock Ry. v. Pennsylvania R. Co.*, 62 F. 2d 1010 (3 Cir. 1933), was cited to the same effect. It is respectfully urged that the question whether the bus operation is an intraterminal transfer service incidental to the rail service within section 49 U. S. C. 302(c) and thus exempt from the Motor Carrier Act really has no relevance to the issue here; i. e., whether the provisions of section 13a(1) have been properly invoked by the Appellee to effect a discontinuance of its passenger trains:

• The *Ferry cases** do not support the decision below because the facts were different. Ferries were involved, not buses. No other mode of transportation was involved. The proposed "abandonment" was brought before the I. C. C. under section 1(18) of the Interstate Commerce Act and the issue was whether the proposed action was really an abandonment of a line of railroad. The I. C. C. answered in the affirmative but the Federal District Court reversed and

* 158 F. Supp. 98 and 104 (D. C. N. J. 1957).

the appeal was before this Court when the Transportation Act of 1958 was passed. By this law, the *Ferry* case issue was rendered moot for the Act expressly states that a "train" or "ferry" may be discontinued. Hence, there was no need for this Court to decide if the *Ferry* cases involved an abandonment of a line of railroad.

POINT II.

A jurisdictional dispute between the Federal Government and a State concerning commerce between two States is a constitutional issue of national importance which is meritorious and warrants full consideration by this Court.

If the Appellee's motion to affirm be granted, the reserved powers of the respective states over purely intrastate train service will be greatly diminished. Congress has never used passenger patterns such as transfers, tickets or terminals as a criterion to decide whether a train is styled as intrastate or interstate. Here, it is irrelevant to State jurisdiction that the intrastate train passenger leaves the train at Susquehanna Transfer in North Bergen, New Jersey, to board an interstate bus proceeding across the New Jersey-New York state line. Also, the fact that an interstate ticket is purchased or that a "terminal" may be involved does not change a traditional intrastate train into an interstate train. Congress expressly mentions a "train" and "ferry" in section 13a, nothing more. Although terminals were covered in the Congressional discussions prior to enacting section 13a, it can reasonably be presumed that the omission of the term from section 13a was intentional. Nowhere was the discussion extended to include even a mention of intraterminal transfers; similarly, the absence

of consideration of the effect of passenger behavior on state jurisdiction indicates that no such concepts may be implied within section 13a. It must be stressed that a train, running from a point within a state to another point within the same state, even though connecting with another or the same mode of interstate transportation, still remains an intrastate train within the state's jurisdiction. This is the existing law that would be changed by upholding the Appellee's position which is based upon an improper interpretation of a statute that is clear and not ambiguous.

Appellants' showing of the consequences (divestment of state authority over intrastate trains) that would result from upholding the Appellee's position is characterized by the Appellee as "unsupportable examples." The contrary is true. Appellants' claims are fully supportable. Thus: In *Pennsylvania-Reading Seashore Lines Train Discontinuance*, *supra*, prior to proceeding before the I. C. C., the Pennsylvania-Reading Seashore Lines and the Pennsylvania Railroad Company asked for relief from the Board. Both intrastate and interstate trains were proposed to be discontinued. The Board rendered its decision reducing the operating schedule relating to intrastate and interstate trains, and the I. C. C., far from denying the Board's jurisdiction in the matter, in effect, upheld the ruling of the Board. (I. C. C. Finance Docket Nos. 21606, 21607, not yet reported.) The Appellee is in error when, speaking of the intrastate trains here, it states that no interstate river crossing service integrates with the intrastate trains. As stated above, two intrastate trains connect with interstate trains which travel to Philadelphia. The affirmance of the decision below would pre-empt state jurisdiction over intrastate trains and place that jurisdiction in the federal gov-

ernment. The commerce clause of the United States Constitution, Article I, Section 8, Clause 3, was never intended to deprive the states of control of commerce within their respective territorial jurisdiction. It reads: "Commerce . . . among the several States," not within the several states. Supporting this view is the Tenth Amendment to the United States Constitution reserving to the states their sovereign rights.

Trains that stop at various points within a state but continue across a state line are not by virtue of such stops transformed into intrastate trains. But if a train starts and stops within a state, never crossing a state line, it can never become an interstate train by the mere fact that (1) it connects with an interstate train; (2) the passengers board interstate buses, ferries, taxis or other modes of interstate transportation; (3) the passengers purchase only interstate tickets; or (4) the train completes its intrastate trip in a terminal area adjoining a river separating two states. Each phase of the travel is separate and apart from the other. These principles apply to the Pennsylvania Railroad Company train service at Newark, New Jersey. Admittedly, many Pennsylvania trains discharge passengers at Newark but continue on to New York. It is not urged that the discharging of passengers makes the train an intrastate operation. The movement of the train, not the passengers, determines whether a train is intrastate or interstate. This is what is so clear in section 13a; it refers unambiguously to a train or ferry "operating from a point in one State to a point in any other State" or operating "wholly within the boundaries of a single State."

Neither the Erie-Lackawanna nor the Central Railroad of New Jersey intrastate train operations are converted

into interstate trains, as Appellee contends, because they either connect with interstate ferries or trains. The *Ferry* cases are not authority for Appellee's contention. The issue there was whether a discontinuance of passenger ferries with a continuance of freight ferries was an abandonment of a line of railroad within I. C. C. jurisdiction under section 49 U. S. C. § 1(18). With the passage of section 13a, either a train or ferry crossing a state line could be discontinued by a carrier. Thus, as this Court recognized,* the *Ferry* case issues were made moot by the new law. But this law did not say that an intrastate train connecting with an interstate train or ferry was thereby transformed into an interstate train. Section 13a simply deals with either a "train or ferry," each separate from the other. Appellee's contention that the Erie-Lackawanna and the Central Railroad train operations connecting with interstate transportation are, by virtue of section 13a, interstate trains is therefore plainly erroneous.

In summary, contrary to Appellee's argument, the intrastate operations which may subsequently be affected by an affirmance of the decision below are not insubstantial but in fact are most substantial, for at least 167 intrastate trains are involved in the State of New Jersey alone.

Conclusion.

The Jurisdictional Statement filed herein by Appellants states the issues and outlines the arguments. Little more can be added at this stage of the proceeding. But the serious problems which flow from an improper interpretation of section 13a are clear. Until they are resolved, neither the Appellants nor the railroads will understand

* 359 U. S. 957 (1959); 359 U. S. 982 (1959).

their respective roles under that law. Appellants respectfully urge that this Court keep its eye on the train or ferry to be discontinued and not on the passenger, ticket, or terminal. If the train begins at a point in a state and that train terminates its run in that same state, the conclusion that it is an intrastate train is inescapable.

Appellants submit that the issues presented on this appeal are substantial; that they are of general public interest and merit fuller consideration by this Court than is possible at this preliminary stage. If, on the other hand, the Court will permit the Appellee to obfuscate the movement of its train by diverting the Court's attention to the movement of the passenger, or the destination on the ticket, or the area of the terminal, then an unintended interpretation may be read into the law. Appellee's motion to affirm should be denied; or, in the alternative, ruling thereon should be deferred until such time as the case is fully heard by this Honorable Court.

Respectfully submitted,

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Dated: June 8, 1962.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1961.

No. 937

STATE OF NEW JERSEY AND BOARD
OF PUBLIC UTILITY COMMISSIONERS
OF THE STATE OF NEW JERSEY, .

Appellants,

vs.

NEW YORK SUSQUEHANNA AND
WESTERN RAILROAD COMPANY,

Appellee.

PROOF OF SERVICE

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1961.

No. 937

STATE OF NEW JERSEY AND BOARD
OF PUBLIC UTILITY COMMISSIONERS
OF THE STATE OF NEW JERSEY,

Appellants,

PROOF OF SERVICE

vs.

NEW YORK SUSQUEHANNA AND
WESTERN RAILROAD COMPANY,

Appellee.

I, William Gural, one of the attorneys for the State of New Jersey and its Public Utility Commission, appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the day of June, 1962, I caused to be mailed 40 copies of the attached Brief in opposition to Appellee's Motion to Affirm to the Clerk of the Supreme Court of the United States, Washington, D. C., for filing in the Supreme Court of the United States, and caused to be mailed copies thereof to the several parties thereto, as follows:

1. On the United States, by mailing a copy thereof, with first-class postage prepaid, to the office of David M. Satz, Jr., Esq., United States Attorney for the District of New Jersey, at Room 451a, Federal Building, Newark 1, New Jersey, and by mailing a copy in a duly addressed envelope, with first-class postage prepaid, to the Solicitor General, at the office of

STATE OF NEW JERSEY AND BOARD
OF PUBLIC UTILITY COMMISSIONERS
OF THE STATE OF NEW JERSEY,

Appellants,

PROOF OF SERVICE

vs.

NEW YORK SUSQUEHANNA AND
WESTERN RAILROAD COMPANY,

Appellee.

I, William Gural, one of the attorneys for the State of New Jersey and its Public Utility Commission, appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the day of June, 1962, I caused to be mailed 40 copies of the attached Brief in opposition to Appellee's Motion to Affirm to the Clerk of the Supreme Court of the United States, Washington, D. C., for filing in the Supreme Court of the United States, and caused to be mailed copies thereof to the several parties thereto, as follows:

1. On the United States, by mailing a copy thereof, with first-class postage prepaid, to the office of David M. Satz, Jr., Esq., United States Attorney for the District of New Jersey, at Room 451a, Federal Building, Newark 1, New Jersey, and by mailing a copy in a duly addressed envelope, with first-class postage prepaid, to the Solicitor General, at the office of the Department of Justice, Washington, D. C. and to Raymond A. Young, Esq., attorney of record, at the Federal Building, Newark 1, New Jersey.

2. On the Interstate Commerce Commission, by mailing copies, in duly addressed envelopes, with first-class postage prepaid, to Robert M. Ginnane, Esq., its General Counsel, and to H. Neil Garson, Esq., its attorney of record, at the offices of the Commission, Washington 25, D. C.

3. On the New York, Susquehanna and Western Railroad Company, plaintiffs below, by mailing a copy thereof in a duly addressed envelope, with first-class postage prepaid, to Vincent P. Biunno, Esq., c/o Lum, Biunno & Tompkins, attorney of record, at his office at 605 Broad Street, Newark 2, New Jersey.

4. On the United States District Court for the District of New Jersey, by mailing a copy thereof with first-class postage prepaid, to Angelo Locascio, Esq., its Clerk, at his office at Federal Square, Newark 1, New Jersey.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1962

No. 104

STATE OF NEW JERSEY AND BOARD OF PUBLIC UTILITY
COMMISSIONERS OF THE STATE OF NEW JERSEY,

Appellants,

v.

NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD
COMPANY, UNITED STATES OF AMERICA AND INTER-
STATE COMMERCE COMMISSION, *Appellees.*

On Appeal from the United States District Court
for the District of New Jersey

**MOTION OF RAILWAY LABOR EXECUTIVES' ASSO-
CIATION FOR LEAVE TO FILE A BRIEF ON THE
MERITS AS AMICUS CURIAE, AND ANNEXED
BRIEF**

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October, 1962

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STATUTES:

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1962

No. 104

STATE OF NEW JERSEY AND BOARD OF PUBLIC UTILITY
COMMISSIONERS OF THE STATE OF NEW JERSEY,
Appellants,

v.

NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD
COMPANY, UNITED STATES OF AMERICA AND INTER-
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On Appeal from the United States District Court
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**MOTION OF RAILWAY LABOR EXECUTIVES' ASSO-
CIATION FOR LEAVE TO FILE A BRIEF ON THE
MERITS AS AMICUS CURIAE, AND ANNEXED
BRIEF**

The Railway Labor Executives' Association respectfully moves the Court for leave to file the annexed brief *amicus curiae* on the merits of the appeal in this case by the State of New Jersey and the Board of Pub-

lie Utilities Commissioners of the State of New Jersey. The Association obtained the consent of the appellee Interstate Commerce Commission. However, consent of the attorney for the appellee railroad was requested but refused.

I

The Railway Labor Executives' Association is a voluntary unincorporated association located in Washington, D. C., with which are affiliated twenty-three standard national and international railroad labor organizations that are the duly authorized representatives of more than 90 per cent of the nation's rail employees under the Railway Labor Act (45 U.S.C.A., Section 151 et seq.). The names of these individual organizations are:

American Railway Supervisors' Association

American Train Dispatchers' Association

Brotherhood of Locomotive Engineers

Brotherhood of Locomotive Firemen and
Enginemen

Brotherhood of Maintenance of Way Employees

Brotherhood of Railroad Signalmen

Brotherhood of Railroad Trainmen

Brotherhood Railway Carmen of America

Brotherhood of Railway and Steamship Clerks,
Freight Handlers, Express and Station Em-
ployes

Brotherhood of Sleeping Car Porters

Hotel and Restaurant Employees and Bartenders
International Union

International Association of Machinists

International Brotherhood of Boilermakers, Iron
Ship Builders, Blacksmiths, Forgers and
Helpers

International Brotherhood of Electrical Workers

International Brotherhood of Firemen and Oilers

International Organization Masters, Mates &
Pilots of America

National Marine Engineers' Beneficial Association

Order of Railway Conductors and Brakemen

Railroad Yardmasters of America

Railway Employees' Department, AFL-CIO

Seafarers' International Union of North America

Sheet Metal Workers' International Association

Switchmen's Union of North America

The Order of Railroad Telegraphers

This Court has heretofore recognized the Association as a proper party to appear and speak for these organizations and their member employees. *Interstate Commerce Commission v. Railway Labor Executives' Association*, 315 U.S. 373 (1942); *Railway Labor Executives' Association v. United States*, 339 U.S. 142 (1950); *American Trucking Associations, Inc., et al. v. United States*, 355 U.S. 141 (1957).

Many of the foregoing organizations represent employees of the appellee railroad. As set forth below, the Association, acting on behalf of itself, these individual organizations, and the employees they represent, protested before the Interstate Commerce Commission the proposed train discontinuances involved in this case. The Association did not participate in the proceedings in the court below only because it was unaware that such proceedings were in progress until it was too late to intervene therein.

II

The questions presented by the appeal in this case are of vital importance to the Railway Labor Executives' Association, the individual organizations of which it is composed, and the railroad employees they represent.

When the notice of the appellee railroad to discontinue the passenger trains involved was first filed with the Interstate Commerce Commission pursuant to Section 13a(1) of the Interstate Commerce Act, the Association by letter dated January 6, 1961, entered its formal protest and complaint against the proposed discontinuance and advised the Commission that "this discontinuance, if carried out, will result in adverse effect to certain employees of the carrier." The same adverse effect is present in any proposed passenger train discontinuance. Thus the Association, the individual organizations of which it is composed and the employees represented by these organizations have a substantial interest in the effect of the decision below both upon the statutory procedures which the appellee railroad is required to follow in this particular instance as well as its effect upon all passenger train discontinuances.

The practical effect of the decision below is that railroad employees are denied the benefit of a hearing in which they have a full opportunity to test upon an evidentiary record the need to discontinue passenger trains where such a discontinuance results in loss of their jobs. This effect would be substantial if the decision below were limited solely to the present case. However, the decision below also has the effect of seriously circumscribing the application of Section 13a(2) to proposed passenger train discontinuances by

placing under Section 13a(1) proposed discontinuances of trains operating wholly within one state, but which carry passengers into another state by means of another form of transportation operated by a company not affiliated with the rail carrier.

III

The appellants in this case are not in the same position as is the Association to speak for the whole of railroad labor with respect to the important problems of statutory construction before the Court on this appeal.

WHEREFORE, the Association moves the Court for leave to file the brief annexed hereto on the merits of the questions raised by the appeal.

Respectfully submitted,

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October, 1962

IN THE
Supreme Court of the United States

OCTOBER TERM, 1962

No. 104

STATE OF NEW JERSEY AND BOARD OF PUBLIC UTILITY
 COMMISSIONERS OF THE STATE OF NEW JERSEY,
Appellants,

v.

NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD
 COMPANY, UNITED STATES OF AMERICA AND INTER-
 STATE COMMERCE COMMISSION, *Appellees.*

On Appeal from the United States District Court
 for the District of New Jersey

**BRIEF OF RAILWAY LABOR EXECUTIVES'
 ASSOCIATION AS AMICUS CURIAE**

The Railway Labor Executives' Association submits this brief as *amicus curiae* in support of the prayer of the State of New Jersey and the Board of Public Utility Commissioners of the State of New Jersey that this Court reverse a final judgment of the United States District Court for the District of New Jersey, 200 F. Supp. 860 (1961), holding that Section 13a(1) of the Interstate Commerce Act (49 U.S.C.A., Section 13a(1)), rather than Section 13a(2) thereof, was applicable to a proposed discontinuance by the appellee railroad of certain passenger trains operating wholly within points of New Jersey.

THE INTEREST OF THE ASSOCIATION

The interest of the Association in this case is set forth in the annexed motion of the Association for leave to file this brief and need not be repeated here.

QUESTION PRESENTED

In the opinion of the Association, the question before the Court is whether the appellee railroad must follow the procedures set forth in Section 13a(1) of the Interstate Commerce Act, as the court below held, or those set forth in Section 13a(2) of such Act in seeking to discontinue certain passenger trains operated wholly within the State of New Jersey.

ARGUMENT

In *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Company*, 353 U.S. 30 (1957) this Court laid down the rule of statutory construction applicable to the question here presented. At page 35 of its opinion in that case, the Court stated:

"The language of § 3, First (i.e. Railway Labor Act) * * * should be literally applied in the absence of a clear showing of a contrary or qualified intention of Congress."

Also see *Flora v. United States*, 357 U.S. 63 (1958) at page 65.

The language of the statute here involved is plain and unambiguous. Section 13a(2) is applicable to a proposed "discontinuance or change, in whole or in part, by a carrier or carriers subject to this chapter, of the operation or service of any train or ferry operated wholly within the boundaries of a single State". On the other hand, Section 13a(1) is applicable "to

the discontinuance or change, in whole or in part, of the operation or service of any train or ferry operating from a point in one State to a point in any other State or in the District of Columbia, or from a point in the District of Columbia to a point in any State". It is undisputed that the trains here involved operated wholly within the State of New Jersey. The statutory language as applied to the admitted fact that the trains involved operate wholly within the State of New Jersey, can lead only to the conclusion that Section 13a(2), rather than Section 13a(1), is the applicable statutory provision.

In spite of the statutory language, the decision of the court below held that Section 13a(1) was applicable because of the interstate character of the passengers' journey. However, as is clearly pointed out in the memorandum filed in this case on behalf of the United States and the Interstate Commerce Commission, the legislative history of the statutory provisions here before the Court clearly shows that Congress intended the scope of the two sections to be precisely what their plain and unambiguous language provides.

The dissenting opinion of Circuit Judge McLaughlin succinctly sums up the erroneous nature of the majority opinion in the following statement: (page 867).

"The statute is a lean, lucid law. It cannot be misconstrued as it stands. The majority opinion refuses to take on that impossible task. So it rests its reversal of the Interstate Commerce Commission on the proposition that what the latter does in its decision is 'thwart the *apparent* purpose of Congress in adopting it.' (Emphasis supplied.) Actually, the true purpose of Congress is expressed in the unmistakable language of § 13a(1) itself. That language cannot be wrenched apart to absorb

the expedient endeavor to do now what was never contemplated when the amendment was enacted.

... If § 13a(1) had been meant to contain the power to wipe out an entire intrastate railroad passenger service by tying it into the interstate connecting buses, the word "bus" would have been placed in the amendment as was the word "ferry". If that had occurred, in all probability, the amendment would never have passed the Senate. It does seem rather conclusive that all of the legislative history re the amendment, both affirmative and negative, vividly establishes that its language is meaningful and is exactly what was agreed to.

Indeed, the Circuit Judge member of the statutory court described the appellee railroad's interpretation of Section 13a(1) as "fantastic". (page 868).

CONCLUSION

Upon the basis of the foregoing points and authorities, it is respectfully submitted that the judgment of the District Court should be reversed.

Respectfully submitted,

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October, 1962

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COMPANY, *Appellee***

**On Appeal from the United States District Court for the
District of New Jersey**

**MOTION OF THE NATIONAL ASSOCIATION OF RAIL-
ROAD AND UTILITIES COMMISSIONERS THAT SAID
ASSOCIATION BE GRANTED LEAVE TO FILE A
BRIEF AMICUS CURIAE HEREIN**

**BRIEF OF SAID ASSOCIATION PRESENTED
WITH SAID MOTION**

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October 17, 1962

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BRIEF AMICUS-CURIAE HEREIN

I

The National Association of Railroad and Utilities Commissioners, hereinafter referred to as "NARUC", is a voluntary organization, the membership of which embraces the members of the railroad and public utility regulatory commissions and boards of all the States of the United States. The members of the Board of Public-Utility Commissioners of the State of New Jersey belong to the NARUC.

By the Constitution of the NARUC its attorneys may be directed to appear on behalf of the NARUC, as distinguished from the individual commissions represented within its membership, in any proceeding pending before any court or commission in which it is felt that appearance on behalf of the NARUC should be made. This motion and the brief presented herewith are offered on behalf of the NARUC by direction of its Executive Committee in the general public interest.

On July 31, 1962, the Executive Committee of the NARUC at a regular meeting duly adopted the following resolution:

**RESOLUTION REGARDING THE CASE OF NEW JERSEY
V. NEW YORK, SUSQUEHANNA AND WESTERN
RAILROAD CO.**

Whereas, An opinion of a United States District Court in *New York, Susquehanna and West-Railroad Co. v. United States* (200 F. Supp. 860) has held that section 13a(1) of the Interstate Commerce Act is applicable to the discontinuance of a railroad passenger train operating solely between points in a single state by reason of the fact that the train connects with an interstate bus which crosses a state line; and

Whereas, This decision has been appealed to the United States Supreme Court; and

Whereas, If allowed to stand, this decision will materially limit the application of section 13a(2) of the Interstate Commerce Act and further erode the jurisdiction of the states over discontinuance of passenger trains; now, therefore, be it

Resolved, By the Executive Committee of the National Association of Railroad and Utilities Commissioners that the legal representatives of the Association are hereby authorized to participate as appropriate in the aforesaid cause in sup-

port of the position that the passenger train service in question does not come within the provisions of section 13a(1) of the Interstate Commerce Act.

II

On October 2, 1962, requests were addressed to the Attorney General of the State of New Jersey and to counsel for the New York, Susquehanna and Western Railroad Company asking the assent of each to the filing of a brief on behalf of the NARUC, *amicus curiae*, in this proceeding, in support of the appellants herein. The Attorney General of the State of New Jersey has granted the requested assent, but counsel for the New York, Susquehanna and Western Railroad Company have refused to assent.

III

Because the regulatory commissions and boards represented in the membership of the NARUC are governmental bodies of the several States of the United States and have a vital interest in any judicial interpretation of Section 13(a)(1) of the Interstate Commerce Act, and because the brief sought to be filed in their behalf is offered in the public interest of the peoples of said States, the NARUC respectfully represents that the filing of a brief, *amicus curiae*, tendered herewith in this case ought not to be prevented by the refusal of the New York, Susquehanna and Western Railroad Company to assent to such filing.

In support of this motion, the NARUC cites as precedent the decisions of this Court upon similar motions made on behalf of the state commissions in *Board of Railroad Commissioners v. Great Northern Railway*, 281 U.S. 412; and *Public Service Commis-*

sion of Wisconsin v. Wisconsin Telephone Company, 309 U.S. 657. In the *Board of Railroad Commissioners* case, the Court, upon motion, and notwithstanding the opposition of the appellee, granted leave to file a brief on behalf of state regulatory commissions, amicus curiae, indicating in the ruling of the Court, announced orally by the Chief Justice, that the motion was granted by reason of the public character of the state commissions and boards, on behalf of which said brief was offered for filing.

IV

The NARUC, accordingly, presents herewith a copy of the brief which it desires to file, and respectfully moves that it be granted leave to file the same.

Respectfully submitted,

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BRIEF OF THE NATIONAL ASSOCIATION OF RAILROAD
AND UTILITIES COMMISSIONERS, AMICUS CURIAE

STATEMENT OF THE CASE

New York, Susquehanna and Western Railroad Company, hereinafter referred to as "Susquehanna", operates railroad passenger trains between Butler, New Jersey, and Susquehanna Transfer in North Bergen, New Jersey, entirely within the State of New Jersey. Passengers who desire to commute on into New York City are transported from Susquehanna Transfer to

the Port of New York Authority Bus Terminal in New York City by motor bus over the public highways. The motor buses are owned and operated by Public Service Coordinated Transport, unaffiliated but under contract with Susquehanna.

Purportedly acting under Section 13(a)(1) of the Interstate Commerce Act, Susquehanna on December 30, 1960, filed a notice with the Interstate Commerce Commission, hereinafter referred to as "I.C.C.", that it would discontinue all of its passenger trains described as operating between Butler, New Jersey, and New York City.

The State of New Jersey and its Board of Public Utility Commissioners, hereinafter referred to as the "Board", filed a petition with the I.C.C. praying, among other things, that Susquehanna's notice be dismissed as being improperly filed under Section 13(a)(1). The I.C.C., by its Division 4, on January 18, 1961, dismissed Susquehanna's notice for lack of jurisdiction, upon a finding that the passenger trains proposed to be discontinued operated solely within the State of New Jersey. The I.C.C. concluded that the notice was improperly filed under Section 13(a)(1). Susquehanna filed a petition for reconsideration of the I.C.C. order, which was denied by order of May 10, 1961.

Susquehanna, thereupon brought action in the United States District Court for the District of New Jersey to have the I.C.C. orders of January 18 and May 10, 1961, set aside. In a divided opinion, the District Court held that the I.C.C. had jurisdiction under Section 13(a)(1). That opinion is on appeal herein.

QUESTION PRESENTED

The basic question presented herein is whether the provisions of Section 13(a)(1) of the Interstate Commerce Act, referring to the discontinuance of "a train or ferry operating from a point in one State to a point in any other State," may be construed to embrace passenger train service between points in the same State when such service is offered in conjunction with an interstate motor bus operation.

STATEMENT OF POSITION

It is the position of the NARUC that the application of Section 13(a)(1) is limited to situations involving a train or ferry operating from a point in one State to a point in another State and that single State passenger train service can not be coupled with an interstate motor bus operation so as to bring such train service within the provisions of that Section. Accordingly, the I.C.C. is without jurisdiction in this proceeding and it properly dismissed the notice filed by Susquehanna in its order of January 18, 1961.

ARGUMENT

The Provisions of Section 13(a)(1) of the Interstate Commerce Act Are Not Applicable to the Instant Case

We are not concerned here with the constitutional grant to Congress of power to regulate interstate commerce. It is plain that the States are free, insofar as the Commerce Clause is concerned, to make laws affecting interstate commerce, provided Congress has not acted to prevent such state regulation.

The Interstate Commerce Commission is a statutory body and possesses only such jurisdiction and powers as are conferred upon it by statute. It is well settled that the powers of a regulatory commission are special and limited, and it can exercise only such authority as

is legally conferred by express provision of law, or such as is by fair implication and intendment incident to and included in the authority expressly conferred, and that any reasonable doubt of the existence of any particular power in the commission should be resolved against the exercise of such power. *Backus-Brooks Co. v. Northern Pacific R. Co.*, 21 F. (2d) 4.

This is doubly true where a conflict with state jurisdiction is involved, as this Court stated in *Palmer v. Massachusetts*, 308 U.S. 79, 84:

"In construing legislation, this Court has disfavored inroads by implication on State authority and resolutely confined restrictions upon the traditional power of states to regulate their local transportation to the plain mandate of Congress."

The question that is controlling of the issue in this case is whether or not the I.C.C. has received a plain mandate from Congress to permit the train-bus discontinuance in question.

The issue herein, it should be made clear at the outset, is a *discontinuance of service* and not an *abandonment of a line* of railroad, provisions concerning the latter being found in Section 1(8) of the Interstate Commerce Act. That subsection was not intended to apply to curtailments or discontinuances of passenger train service, nor has it ever been interpreted to so apply. *Board of Public Utility Com'rs. of N. J. v. United States*, 158 F. Supp. 98 and 158 F. Supp. 164.

For the first 71 years of the I.C.C.'s existence, it similarly held that it had no authority under Section 1(18), or any other part of the Act, to curtail or discontinue rail service. *Public Convenience Application of K.C.S. Ry.*, 94 I.C.C. 691; *Morris & E. R. Co. Proposed Abandonment*, 175 I.C.C. 49; and *Re New York*

Central Railroad Co.; 254 I.C.C. 745. This was succinctly stated by the I.C.C. in *Morris & E. R. Co. Proposed Abandonment*, supra:

"... we have no jurisdiction over a partial discontinuance of rail service. Accordingly, the part of this application which covers the proposed abandonment of passenger service and the substitution of busses therefore is not a matter which in itself we are authorized to decide." (p. 52).

It is evident, therefore, that prior to 1958 the I.C.C. was without jurisdiction over any discontinuance of passenger train service even when furnished in interstate commerce.

In 1958, limited jurisdiction in the field of train discontinuance was placed by Congress in the I.C.C. The applicable provisions of the Transportation Act of 1958 may be found in Section 13(a) of the Interstate Commerce Act. (49 U.S.C. 13a.)

Section 13(a)(1) deals with the "discontinuance or change, in whole or in part, of the operation or service of any train or ferry operating from a point in one State to a point in any other State..." These are what might be called interstate trains or ferries.

Section 13(a)(2) deals with "the discontinuance or change, in whole or in part, ... of the operation or service of any train or ferry operated wholly within the boundaries of a single State..." These are what might be called intrastate trains or ferries.

The procedures to accomplish discontinuance vary materially under the two subsections. Under Section 13(a)(1) a train may be discontinued upon thirty days' notice. A hearing is not compulsory. Right of appeal is limited.

On the other hand, Section 13(a)(2) requires full hearing and specific findings in order to displace state authority and permit discontinuance.

In other words, it is of major importance to the state regulatory commissions whether a proceeding is brought under Section 13(a)(1) or Section 13(a)(2).

The instant case was brought under Section 13(a)(1) as relating to a discontinuance "of the operation or service of any train or ferry operating from a point in one State to a point in any other State."

The plain meaning of this language was best enunciated by Circuit Judge McLaughlin in his dissenting opinion in the lower court when he stated:

"The statute is a lean, lucid law. It cannot be misconstrued as it stands."

A motor bus is neither a "train" nor a "ferry". The train operation involved in this case is solely within the State of New Jersey—from Butler, New Jersey to Susquehanna Transfer in North Bergen, New Jersey. The only operation "from a point in one State to a point in any other State" is that performed by the motor bus company. The plain mandate of Congress, however, in Section 13(a)(1) is applicable only to a "train or ferry".

Further, the legislative history of Section 13(a)(1) amply demonstrates that Congress meant exactly what it said—that the section applies to trains and ferries, nothing else.

From January to April, 1958, the Subcommittee on Surface Transportation of the Senate Committee on Interstate and Foreign Commerce held a series of hearings on "Problems of the Railroads." Following these hearings, there was introduced in the Senate a

bill S. 3778 embracing the recommendations of the Subcommittee on Surface Transportation growing out of testimony received at the hearings.

Pertinent to the Section 13(a) amendment, S. 3778 as introduced on May 8, 1958, originally provided:

"... the discontinuance or change, in whole or in part, of the operation or service of any train or ferry engaged in the transportation of passengers or property in interstate, foreign and intrastate commerce, or any of them, or the operation or service of any station, depot or other facility where passengers or property are received for transportation in interstate, foreign and intrastate commerce, or any of them . . ."

Such provision was extremely broad and admittedly would have been applicable to the relief Susquehanna now seeks. However, Congress did not enact such language. Material changes were made in the provisions of Section 13(a) during its progress through Congress.

One, the standard "transportation . . . in interstate, foreign and intrastate commerce" was deleted from the bill. Instead, the standard became "the operation or service of any train or ferry operating from a point in one State to a point in any other State." In short, Congress amended the bill to completely negate the major premise of Susquehanna's contention herein.

During Senate consideration, Senator Russell of Georgia suggested an amendment to protect state commission jurisdiction over intrastate trains. Senator Smathers, sponsor of S. 3778, replied:

"... we would be perfectly agreeable, if the Senator from Georgia would accept the amendment, to offer an amendment which would state specifically that, with respect to any train which operates within a State, whose origin and destina-

tion are within the State—that is, any train with intrastate characteristics—together with the facilities used by the train, shall be completely under the authority of the State public utilities commission, and shall not be in any way affected by the language of this particular proposal, to which the Senator from Georgia objects.” (104 Cong. Rec. p. 10852)

As can readily be seen from the final language of the bill, this operational standard for jurisdiction was incorporated in the amendment.

Second, Congress further limited and made more specific the applicability of Section 13(a) during Senate consideration of S. 3778. During the debate on the floor of the Senate, Senator Neuberger offered an amendment to this portion of the bill (104 Cong. Rec. p. 10864):

“My amendment would amend lines 6, 14 and 20 on page 6, in section ~~4~~, by inserting the word ‘or’ between the words ‘train’ and ‘ferry’ and striking the words ‘station, depot or other facility’.

“The essential purpose of the amendment is to leave these particular items under State jurisdiction, as they are at present.”

Senator Smathers, sponsor of S. 3778, indicated acceptance of this amendment with the understanding that it would be perfected in conference. The Senate agreed to the Neuberger amendment (104 Cong. Rec. p. 10864).

In the House of Representatives, a companion bill to S. 3778 was introduced, namely H. R. 12832. This bill included the same language as S. 3778 regarding “station, depot or other facility,” but the House Committee on Interstate and Foreign Commerce, in reporting

the bill, deleted this language. The House bill used the reference "line of railroad" as the operational standard for jurisdiction. The Committee stated:

"Because of this delay in authorizing, or absolute refusal to authorize, discontinuance of little-used services, it is proposed to add a new section 13a to the act, whereby the railroads, at their option, may have the Interstate Commerce Commission, rather than State commissions, pass upon the discontinuance or change in the operation or service of any train or ferry. This option is limited, however, to the operation or service of a train or ferry on a line of railroad not located wholly within a single State. This limitation is contained in the bill being reported because the committee feels that the record at this time does not support the broader change in venue requested by the railroads, which would have covered Interstate Commerce Commission jurisdiction also over operations more local in character, such as those of a branch line or other line of railroad located solely within one State.

"The bill as introduced also covered the Interstate Commerce Commission passing upon discontinuance or change of the operation or service of stations, depots, or other facilities. This jurisdiction has not been included in the bill as reported, as the committee believes the record presented in its hearings does not support the need for transferring such jurisdiction from State regulatory bodies." (H. Rept. No. 1922—85th Congress, p. 12.)

In the course of the debate on the floor of the House, Congressman Harris, Chairman of the House Committee on Interstate and Foreign Commerce and sponsor of the bill, stated:

"Further, we leave to the State commissions complete authority over intrastate operations. A

train operating over a line of railroad located wholly within a State is within the jurisdiction of the State commission. The abandonment of stations and depots is left with State Commissions. So you can see that practically all of this problem of abandonment is continued with the State Commission, as it has been in the past. The Congress has never preempted that authority." (104 Cong. Rec. p. 12530)

H. R. 12832 passed the House in the form recommended by the Committee.

S. 3778 and H. R. 12832 went to conference and the conference report developed therein passed both the Senate and the House and became Public Law 85-625, known as the Transportation Act of 1958. The House reference to "line of railroad" was rejected and the Senate standard of physical operation from point to point across a state line was accepted. Concerning Section 13(a)(1), the conference committee stated:

"Paragraph (1) deals with the discontinuance or change of the operation or service of a train or ferry—

operating from a point in one State to a point in any other State or in the District of Columbia, or from a point in the District of Columbia to a point in any State."

(House Rept. No. 2274-85th Congress, p. 13).

This study of the legislative history clearly indicates that Congress carefully considered the language of Section 13(a)(1) and that Congress said exactly what it intended to say by the plain meaning of the words. The section was to apply to trains or ferries—nothing else. Also, the standard for I.C.C. jurisdiction was not whether the train or ferry was engaged in inter-

state commerce, but rather whether the train or ferry operated from a point in one State to a point in any other State. Susquehanna, herein, does not qualify on either count.

The majority opinion of the lower court, herein, takes the position that to construe Section 13(a)(1) as applicable only to a train or ferry is to "thwart the apparent purpose of the Congress in adopting it." This statement is completely in error, as the review of the legislative history demonstrates. Rather than thwarting the apparent purpose of Congress, to limit the application of the section to a train or ferry gives the words their plain and obvious meaning and carries out the apparent, avowed and expressed intent of Congress when it enacted the section.

CONCLUSION

The conclusion, therefore, is that the passenger trains operated by Susquehanna operate solely within the State of New Jersey and are not within the applicability of Section 13(a)(1). The L.C.C. properly dismissed their notice for want of jurisdiction. Accordingly, we urge that the L.C.C.'s dismissal be upheld and that the judgment of the District Court be reversed.

Respectfully submitted,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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APPELLANTS' BRIEF ON THE MERITS.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1962.

No. 104.

STATE OF NEW JERSEY AND BOARD OF PUBLIC
UTILITY COMMISSIONERS OF THE STATE OF
NEW JERSEY,

Appellants,

vs.

NEW YORK, SUSQUEHANNA AND WESTERN
RAILROAD COMPANY,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY.

APPELLANTS' BRIEF ON THE MERITS.

Opinions Below.

First, the initial Interstate Commerce Commission ("I. C. C.") order, dated January 18, 1961, dismissed for lack of jurisdiction New York, Susquehanna and Western Railroad Company's (hereafter referred to as "Appellee") notice of train discontinuance filed with the I. C. C. on December 30, 1960. The order is part of the printed record (R. 7).

Secondly, the I. C. C. order dated May 10, 1961 (R. 8), denied Appellee's motion for reconsideration of the I. C. C. order of January 18, 1961.

Lastly, the opinion of the court below (R. 13) is reported in 200 F. Supp. 860 (D. C. N. J. 1961), entitled *New York, Susquehanna & Western R. Co. v. United States*.

Basis of Jurisdiction.

The three-judge district court, one judge dissenting, entered a final judgment (R. 26) dated January 9, 1962, entered on the docket January 11, 1962, setting aside the I. C. C. order of January 18, 1961. The I. C. C. order held that the Appellee improperly filed train discontinuance notices under Section 13a(1) of the Interstate Commerce Act because the trains operated solely within the State of New Jersey. A direct appeal to this Honorable Court from the decision of the three-judge district court is authorized by 28 U. S. C., Section 1253, and the procedure, with which Appellants* have complied, is set forth in 28 U. S. C., Section 2101(b) and Revised Rules 10 and 11(3). On June 25, 1962, this court entered its order (R. 100) noting probable jurisdiction.

Constitutional Provisions and Statute Involved.

In enumerating the Congressional powers, Article 1, Section 8, Clause 3, of the United States Constitution states that Congress shall have power, "To regulate Commerce

* State of New Jersey and Board of Public Utility Commissioners of the State of New Jersey, hereinafter referred to as "Appellants."

with foreign Nations, and among the several States, and with the Indian Tribes; * * * The Tenth Amendment to the United States Constitution provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The statute involved is Section 13a of the Interstate Commerce Act; 72 Stat. 571, 49 U. S. C., Section 13a.

Questions Presented.

1. Whether the Appellee's application, for relief under Section 13a(1), rather than under Section 13a(2), was correctly dismissed by the I. C. C. as beyond its jurisdiction.
2. Whether the I. C. C. was correct in deciding that the phraseology of Section 13a(1), " * * * any train or ferry operating from a point in one State to a point in any other State," does not apply to a train otherwise wholly intrastate, merely because interstate autobus service was available at one terminus.

Statement of the Case:

The Appellee operates passenger train service in New Jersey consisting of three eastbound trains and three westbound trains between Butler, New Jersey and Susquehanna Transfer in North Bergen, New Jersey (R. 45), operating daily except Saturday, Sunday and holidays, and one westbound passenger train operating on certain holidays. A connecting bus operates between Susquehanna Transfer in

North Bergen, New Jersey and the Port Authority Terminal in New York City. The trains stop at intermediate New Jersey points which are set forth in Appellee's "notice of proposed discontinuance of service." (R. 74).

On the 29th and 30th of December, 1960, Appellee posted notices (R. 74) dated December 29, 1960, stating that its passenger train service would be discontinued January 30, 1961. On January 9, 1961, the Appellants filed a petition (R. 75) with the I. C. C. asking that the Commission enter upon an investigation of the Appellee's notice and further prayed for a dismissal without prejudice on the ground that the train service was wholly intrastate, and therefore not within I. C. C. jurisdiction. Although passengers may travel between Butler, New Jersey, and New York City, New York, they cannot do so in one continuous trip. The *trains* and the *tracks* on which they run extend from Butler to Susquehanna Transfer in North Bergen, entirely within New Jersey. From Susquehanna Transfer, passengers may be transported to the Port Authority Bus Terminal in New York City by a bus on a public highway. Upholding the Appellants' position, the I. C. C., by its order (R. 7) dated January 18, 1961, dismissed the notice filed by the Appellee because Section 13a(1) did not apply to the facts of this case.

Thereafter, the Appellee, on February 20, 1961, filed with the I. C. C. a petition for reconsideration (R. 86) of the order entered January 18, 1961. By its order (R. 8) of May 10, 1961, the I. C. C. denied Appellee's petition for reconsideration. The Appellee brought suit (R. 1), on May 18, 1961, in the United States District Court for the State of New Jersey challenging the I. C. C. orders of January 18 and May 10, 1961. The I. C. C. order of January 18,

1961 was set aside by a majority of a three-judge district court with one judge dissenting. Final judgment (R. 26) dated January 9, 1962 was entered on the docket on January 11, 1962.

The Appellants filed a notice of appeal (R. 28) on March 6, 1962, pursuant to 28 U. S. C. Sections 1253, 2101(b) and Revised Rules 10(1), 11(3) of this Court. A cross-appeal by Appellee was served on the Appellants on March 7, 1962. The cross-appeal was taken from so much of the final judgment as restrained the Appellee from discontinuing passenger service pending appeal by the Appellants to this Court. Subsequently, Appellants filed their statement as to jurisdiction, receipt of which was acknowledged by the Clerk of this Court on May 4, 1962, and Appellants otherwise complied with Revised Rules 13 and 15 with respect to the docketing of the case, filing of the record, entering of counsel's appearance, and payment of the docket fee. The time for Appellee to docket its cross-appeal was enlarged by the May 7, 1962, order of District Court Judge Wortendyke, one of the judges of the court below, to such time as this court shall have acted on Appellants' statement as to jurisdiction. While this court noted probable jurisdiction on June 25, 1962, Appellee has not yet docketed its cross-appeal as required by Revised Rule 13.

Appellee, on May 23, 1962, and pursuant to Revised Rule 16(1), served on the Appellants a motion to affirm the judgment of the court below which was mailed to the Clerk of this Court on May 22, 1962. In answer pursuant to Revised Rule 16(3), the Appellants, on June 8, 1962, mailed their brief in opposition to Appellee's motion to affirm, which brief was filed by the Clerk of this Court on June 11,

1962. Thereafter, this Court, pursuant to its Revised Rule 16(4), on June 25, 1962, entered an order noting probable jurisdiction in this matter. By letter dated July 16, 1962, the Clerk of this Court acknowledged receipt of Appellants' designation of portions of the record to be printed, mailed by Appellants on July 12, 1962, within the time required by Revised Rule 17. Likewise, the Appellee thereafter cross-designated portions of the record to be printed.

Thereafter, the Court below on September 4, 1962, on application by the Appellee, issued an order to show cause directed to the Appellants and others to show why the stay in the judgment appealed from should not be vacated or continued with modification. On the return date of such order, September 27, 1962, the three-judge district court discharged the order on the ground that it had no jurisdiction because the judgment was on appeal to this Court.

The Appellants received copies of the printed transcript of record from the Clerk of this Court on September 17, 1962.

Summary of Argument.

A. The history of the Interstate Commerce Act (I. C. C. Act) reveals that Congress had not intended to encroach upon a State's right to regulate intrastate trains. Under the I. C. C. Act from 1887 to 1958, the I. C. C. had no authority over the discontinuance of a train running from a point in one state to a point in another state. The Transportation Act of 1958 was designed in part to grant to the I. C. C. the statutory authority which it lacked over discontinuance of trains. Subdivision 13a(1) of the Act concerns I. C. C. jurisdiction over the discontinuance of an

interstate train or ferry. Conversely, in subdivision 13a(2) state jurisdiction is recognized over an intrastate train and ferry. In this manner, Congress preserved existing state authority. *Palmer v. Massachusetts*, 308 U. S. 79 (1933). It is clear from the history of the legislation that a bus was not intended to be included in Section 13a of the 1958 Transportation Act. Rather, the units of transport unambiguously designated in the law were a train and a ferry. To say that intrastate trains connecting with an interstate bus are within the I. C. C. jurisdiction under subdivision 13a(1) would be contrary to the legislative history and beyond the plain words of the statute. The interpretation of the Court below nullifies the effect of subdivision 13a(2), which continued state authority over intrastate trains.

B. The Congressional debates prior to enactment of Section 13a and its deliberations on the pending bill clearly show that the respective states are to retain jurisdiction over intrastate trains. 104 *Cong. Rec.* 12530 (1958). Upholding the judgment of the Court below would frustrate the Congressional intent.

The interpretation of Section 13a by the administrative agency designated to enforce it, here the I. C. C., is entitled to weight in construing that law. *Boston & M. R. Co. v. Hooker*, 233 U. S. 97 (1914); *New York Central Securities Corporation v. United States*, 287 U. S. 42 (1932). The Court below erred when it set aside the I. C. C. order.

C. Not only are the terms "train or ferry" set forth in the statute clear from the four corners of the law but also from judicial definition. *United States v. Erie R. Co.*, 237 U. S. 402 (1915). Briefly, a train is an engine and cars

assembled to run along the road, thus precluding a connecting bus. This definition is further supported by the Congressional Record where the legislators exclude stations, depots or other facilities from the pending bill and finally agree upon the words "train or ferry." 104 *Cong. Rec.* 12533 (1958); 1958 *U. S. Code Congressional and Administrative News*, p. 3482 at pp. 3486, 7 (Conference Report of the Senate-House Conference Committee). The sole element that must be considered in determining whether the I. C. C. or a state administrative agency has jurisdiction under Section 13a is the train or ferry trip. Does the train operate from a point in one state to a point in another state or does the train operate wholly within one state? That should be the only test. Considering this to be the clear Congressional intent, the intrastate trains here involved are within the jurisdiction of the New Jersey Board of Public Utility Commissioners. This railroad's relief, if it be entitled to any, should flow from subdivision 13a(2), which deals with trains or ferries operated wholly within the boundaries of a single state, and not from 13a(1) which deals with trains or ferries operated from a point in one state to a point in any other state.

ARGUMENT.

POINT I.

The reason for the enactment of 49 U. S. C. Section 13a was to grant to the I. C. C. jurisdiction over discontinuance of trains or ferries in or a burden on interstate commerce.

While the Interstate Commerce Act was enacted in 1887, 42 Stat. 384, it was not until 1920 that Congress un-

dertook to delegate to the I. C. C. jurisdiction over the abandonment of railroad lines. *Transportation Act of February 28, 1920*, 41 Stat. 477, 49 U. S. C. Section 1(18). That law bestowed upon the I. C. C. large powers which formerly had been exercised by the several states; however, the jurisdiction was limited to abandonment of a line of railroad as distinguished from a partial discontinuance of service. *Palmer v. Massachusetts*, 308 U. S. 79 (1939).

The enactment of the Transportation Act of 1958, 72 Stat. 568, which included 49 U. S. C. Section 13a, was an extension of I. C. C. jurisdiction because up to that time 49 U. S. C. Section 1(18), 54 Stat. 901, gave the I. C. C. authority over the abandonment of a line of railroad but not the abandonment of a train running from a point in one State to a point in another State. 104 *Cong. Rec.* 10852 (1958). The ferry cases, *Board of Public Utility Com'rs of N. J. v. United States*, two cases, 158 F. Supp. 98 and 158 F. Supp. 104 (D. C. N. J. 1957), probable jurisdiction noted, 357 U. S. 917 (1958), brought this situation into focus.

The ferry abandonment cases were initiated by the New York Central Railroad Company in one instance, and by the Erie Railroad Company and the Appellee, in another instance. The cases were begun before the enactment of subdivision 13a(1) in 1958. The interstate ferries (between New Jersey and New York) involved connected with intrastate and interstate trains in New Jersey. Passenger ferries were proposed to be abandoned but the freight ferries were to remain in operation. The I. C. C. in both cases allowed the abandonment, taking jurisdiction under 49 U. S. C. Section 1(18). *New York Central Railroad Co. Ferry Abandon-*

ment, 295 I. C. C. 385 (1956), 295 I. C. C. 519 (1957); *Erie Railroad Co. Ferry Abandonment*, 295 I. C. C. 549 (1957). The U. S. District Court reversed the I. C. C. decisions. *Board of Public Utility Com'rs of N. J. v. United States*, two cases, 158 F. Supp. 98 and 158 F. Supp. 104 (D. C. N. J. 1957), probable jurisdiction noted, 357 U. S. 917 (1958). The Court held that the proposed abandonment was a "partial discontinuance of a line of railroad," therefore beyond I. C. C. jurisdiction then existing under 49 U. S. C. Section 1(18). Presumably, if the railroads had sought to cease the operation of interstate trains without abandoning the line of railroad, the decision would have been the same. This was the understanding of the Congress when discussing Section 13a before its enactment. 104 *Cong. Rec.* 10852 (1958). The district court decisions were appealed to this court but before argument the matter was rendered moot by the enactment of the 1958 Transportation Act. 359 U. S. 957 (1959). Subsequently, with the enactment of Section 13a, the railroads were successful in abandoning the interstate ferries on the authority of the newly enacted subdivision 13a(1).

The I. C. C. was not given plenary authority over both an intrastate and an interstate railroad train or ferry by Section 13a of the Interstate Commerce Act. Subdivision 13a(1) grants plenary jurisdiction to the I. C. C. not over an intrastate but an interstate train or ferry only. It reads in part:

"(1) . . . operation or service of any train or ferry operating from a point in one State to a point in any other State . . ." (Emphasis added).

Subdivision 13a(2) recognizes state jurisdiction over an intrastate train or ferry in the following manner;

“(2) * * * the operation or service of any train or ferry operated wholly within the boundaries of a single State * * * where the State authority having jurisdiction thereof * * *” (Emphasis added).

The statute, subdivision 13a(2), goes on to say that if the State authority has denied a petition by the carrier to discontinue or has failed to act on it finally within 4 months, the carrier may apply to the I. C. C. for relief. Congress thereby implies that in the first instance the respective states have dominion over intrastate commerce as an exercise of their sovereign reserved powers recognized in the Tenth Amendment of the U. S. Constitution. To uphold the position urged by the Appellee would be to enlarge the scope of the statute beyond the purpose for which it was passed and to which purpose the plain words of the statute give testimony.

Additional historical background of this legislation may be found in the statements by counsel of the New York Central Railroad Company which was then involved in litigation to discontinue its passenger ferries after the enactment of Section 13a. Counsel states, “I want to say to the Court * * * if you go back to the testimony before the committees, you’ll find that this particular case was the reason for the enactment of this section.” *State of New Jersey v. United States*, 168 F. Supp. 324, 337 (D. C. N. J. 1958). Circuit Judge McLaughlin, dissenting in *State of New Jersey v. United States*, *supra*, said in discussing subdivision 13a(1):

“The admitted reason for the passage of the section was our decision in Board of Public Utility Commissioners of New Jersey v. United States of America, D. C. N. J. 1957, 158 F. Supp. 98. In the

effort to obtain legislation which would enable this railroad or any railroad to summarily wipe out of existence any individual train or ferry or line of trains and ferries within the reach of the amendment the all pervading effect of the immediately preceding Section 13(1) and (2) was quite apparently overlooked; in any event its authority was in nowise restricted."

POINT II.

Assuming that the legislative intent is not clear from the words used in Section 13a, the legislative history of the law conclusively shows that subdivision 13a(1) concerns only a *train* or *ferry* running from a point in one state to a point in another state while subdivision 13a(2) deals exclusively with a *train* or *ferry* operated wholly within the boundaries of a single state.

Congressional reports and debates may be relied upon to determine the legislative intent behind a statute. *United States v. Congress of Industrial Organizations*, 335 U. S. 106 (1948); *Mitchell v. Kentucky Finance Company*, 359 U. S. 290 (1959).

Congressman Oren Harris, Chairman of the House Committee on Interstate and Foreign Commerce, explained the house version of 13a in terms of "a line of railroad" when the bill was pending in Congress in the following manner:

"Mr. Harris . . . we leave to the State commissions complete authority over intrastate operations. *A train operating over a line of railroad located wholly within a State is within the jurisdiction of the State Commission.* The abandonment of stations

or depots is left with the State commissions. So you can see that practically all this problem of abandonment is continued with the State commissions, as it has been in the past. The Congress has never preempted that authority." 104 *Cong. Rec.* 12530 (1958). (Emphasis added.)

Clearly, the legislation as adopted was meant to go no further than to deprive the respective States of jurisdiction over a train or ferry running from a point in one state to a point in another state, such matter constituting less than a railroad line abandonment provided for in 49 U. S. C. Section 1(18). Senator Smathers, a member of the Senate Committee on Interstate and Foreign Commerce, remarked after the issues in the bill were resolved by a Senate-House Conference Committee:

"Mr. Smathers * * * we protected the right of the States * * * by leaving to the State regulatory agencies the right to regulate and have a final decision with respect to the discontinuance of a train service which originated and ended within one particular State, except when it could be established that intrastate service was a burden on interstate commerce.

"In addition, the Senate receded on a provision under which we had given the Interstate Commerce Commission jurisdiction also to discontinue service in depots, terminals, and other such facilities in connection with the operations of railroads. We left the matter in the hands of the State regulatory agencies." 104 *Cong. Rec.* 15528 (1958).

Thus the Senator first shows that the States, under subdivision 13a(2) of the act have jurisdiction over a train which runs from one point in a state to another point within

the same state. Further the exception referred to by Senator Smathers above relates to subdivision 13a(2). Secondly, he states that the statute does not concern depots, terminals or other facilities. It is implicit in his statement to the Senate that a *train or ferry* are the only units of transport intended to be included in the bill. Can the view of the Court below, that the statute includes a bus operation, be reasonably adopted? The answer must be "No.", because the act is unambiguously restricted to a train or ferry, and no more applies to auto-buses than it does to airplanes or stage coaches.

The Court below decided that the interstate character of the passengers' journey permitted the Appellee to avoid the procedure of subdivision 13a(2) thereby bypassing a petition to state authorities. While the I. C. C. has final authority over a discontinuance under both subdivision 13a(1) and 13a(2), the procedure in the latter section provides a more effective means for the protection of state interests. For instance, the I. C. C. may authorize the discontinuance, under subdivision 13a(2), of an intrastate train or ferry "only after full hearing" and findings that (1) the public convenience and necessity permit of such discontinuance and (2) the continued operation would constitute an undue burden on interstate commerce. Conversely, under subdivision 13a(1), a carrier may discontinue an interstate train or ferry (one that runs from a point in one state to a point in another state) without a hearing if the I. C. C., in its discretion, decides not to investigate the matter.

However, though even an intrastate train may transport passengers who intend to proceed across the State line, the language of both subdivisions of Section 13a shows

that the movement of the train or ferry, from point to point, not the movement or intention of the passenger, is the determining factor. The Conference Report of the Senate-House Conference Committee makes this clear inasmuch as it refers to a train or ferry; there are no remarks as to buses or passengers. 1958 *U. S. Code Congressional and Administrative News*, p. 3482 at pp. 3486, 7. Notwithstanding the value of Congressional debates in ascertaining the intent of Congress, a conference report should be accorded greater weight because divergent views have been resolved and a unified intention presented.

POINT III.

The District Court misapplied the law to the facts in upholding Appellee's position that subdivision 13a(1) was correctly invoked for the discontinuance of passenger trains operated wholly within New Jersey.

The Court below rests its action not upon the clear language of the statute but on the ground that to apply subdivision 13a(1) to a train or ferry only would "thwart the apparent purpose of the Congress in adopting it" (R. 19). The judgment of the Court, in reversing the order of the I. C. C. (R. 7), necessarily declares by implication that intrastate trains are not within a state's jurisdiction. Congress, in enacting Section 13a, never intended to say this. Instead, Congress desired to protect state authority over "A train operating over a line of railroad located wholly within a State * * *" (R. 99).

The District Court was in error when it found a Congressional intent for which there is no basis in the clear

language of the statute. On the other hand, the I. C. C. recognized that even though terminals had been discussed when Section 13a was being debated in Congress (104 *Cong. Rec.* 12533 (1958)), subdivision 13a(1), as enacted, limited the I. C. C. jurisdiction to a "train or ferry operating from a point in one State to a point in any other State" This view by the I. C. C. is expressed in its order of January 18, 1961 (R. 7) and in subsequent proceedings in this matter. It is a familiar rule that a construction made by an administrative body charged with the enforcement of a statute, although not controlling, may be resorted to as an aid in ascertaining the legislative intent and is entitled to persuasive weight. *Boston & M. R. Co. v. Hooker*, 233 U. S. 97 (1914); *New York Central Securities Corporation v. United States*, 287 U. S. 12 (1932). This doctrine of contemporaneous construction of a statute applies to Section 13a because the I. C. C. has acted pursuant to its authority under that law. Further, this Court has said that, under certain circumstances, the I. C. C. construction of a statute may "be treated as read into the statute." *New York, N. H. & H. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361 (1906).

The instant matter is governed by subdivision 13a(1), not by 49 U. S. C. Section 302(c)(1) and (2). The latter statute concerns terminal areas. There is no necessary correlation between commerce which crosses State lines, and commerce within a terminal area; such areas do not always straddle state boundaries. Therefore, the I. C. C. determinations in *New York, Susquehanna and Western Railroad Company, etc. Application*, 34 M. C. C. 581 (1942) and 46 M. C. C. 713 (1946), to the effect that the bus service

between Susquehanna Transfer and New York City is an intra-terminal operation cannot be construed to mean that such service comes within subdivision 13a(1) which covers a "train or ferry operating from a point in one State to a point in any other State * * *." The I. C. C. made no mention of terminal areas in its order of January 18, 1961, although it was most familiar with the subject matter, having passed on the issue before. The District Court improperly extended the reach of subdivision 13a(1), by the use of other statutes which are not related to the discontinuance of a train.

The Court below held that the term "operation" in subdivision 13a(1) could not be equated with the word "movement"—this to rebut the position taken by the Appellants, namely, that the I. C. C. jurisdiction in subdivision 13a(1) is limited to a train or ferry which runs from a point in one State to a point in another State. The context of the statute explains to some extent the use of the term "operation." Subdivision 13a(1) relates to operation of a train or ferry "from a point in one State to a point in any other State," that is, to operation in interstate commerce whereas subdivision 13a(2) applies to operation of a train or ferry "operated wholly within the boundaries of a single State," namely, conventional *intrastate* commerce, as to which vastly greater protection is accorded in deference to the long standing reserved powers of the States in that domain. *Palmer v. Massachusetts*, 308 U. S. 79 (1939).

So much for the concept of "operation"; the meanings of "train" and "railroad" are equally clear. In the statute itself Congress rejected the idea that a ferry is a train, when to "train" it added the phrase, "or ferry," which is

utter surplusage if "any train" means as the Appellee would have it, "any train and any other mode of transportation connecting therewith."

This Court indicated in *Transit Commission v. United States*, 289 U. S. 121, 128 (1933), that "operation" of a "line of railroad" signified a train running on tracks. In that case, the Long Island Railroad Company had agreed to the joint use of the railroad tracks of the Pennsylvania Tunnel and Terminal Railroad Company. This agreement, the Court said, was within the I. C. C. jurisdiction. Moreover, in *United States v. Eric R. Co.*, 237 U. S. 402, 407 (1915), this Court stated that a train consists of "an engine and cars which have been assembled and coupled together for a run or trip along the road." The I. C. C., in *Arlington & F. A. R. Co.*, 228 I. C. C. 479 (1938), stated that auto-rail cars, operating within one state as rail cars but converting to auto cars and then crossing the state line into another state, were not an extension of a line of railroad. Two decisions of this Court were cited as supporting the view of the I. C. C.: *Texas & P. Ry. Co. v. Gulf, C. & S. F. Ry. Co.*, 270 U. S. 266 (1926) and *Railroad Commission of California v. Southern Pac. Co.*, 264 U. S. 331 (1924).

The following statement by Congressman Oren Harris makes it clear that the phrase "operation or service" excludes stations, depots, or other facilities. The Congressman remarked:

"Mr. Harris . . . Section 4 of the bill adds a new section 13a to the act, whereby the railroads, at their option, may have the Interstate Commerce Commission, rather than the State Commissions, pass upon the discontinuance or change in the operation or

service of any train or ferry. *This option is limited, however, to the operation or service of a train or ferry on a line of railroad not located wholly within a single State.* This limitation is contained in the bill being reported because the Committee feels that the record at this time does not support the broader change in venue, requested by the railroads, which would have covered Interstate Commerce Commission jurisdiction also over operations more local in character, such as those of a branch line or other line of railroad located solely within one State.

"The bill as introduced also covered the Interstate Commerce Commission passing upon discontinuance or change of the operation or service of stations, depots, or other facilities. This jurisdiction has not been included in the bill as reported, as the committee believes the record presented in its hearings does not support the need for transferring such jurisdiction from State regulatory bodies." 104 *Cong. Rec.* 12533 (1958). (Emphasis added.)

The phrase in Section 13a, "operation or service," thus does not include stations, depots or other facilities. The operation or service is inseparable from the train or ferry run. If Congress had intended to broaden the train or ferry concept, it could have used the terms "railroad" and "transportation" which then existed in 49 U. S. C. Section 1(3)(a). The scope of the words there defined would include stations, depots or other facilities. Explaining the jurisdiction of the I. C. C. and clarifying the term "service," Senator Smathers and Senator Kuchel remarked:

"Mr. Smathers. . . . We give authority to the Interstate Commerce Commission only over inter-

state-commerce trains. We more clearly define that the public utilities commission has authority over completely intrastate trains and facilities.

"Mr. Kuchel. Yet, up to 1958, Congress has not seen fit to preempt the field, but, to the contrary, until 1958 Congress has recognized that each State, through its utilities commission, should sit in judgment on what *services* should be performed." 104 *Cong. Rec.* 10852 (1958). (Emphasis added.) Other related discussions at 104 *Cong. Rec.* 12530 (1958).

The "services" spoken of were those of a train performed while running from one State to another State over which each respective state by its appropriate regulatory agency had jurisdiction. Throughout their deliberations, the legislators never mention a bus nor is there evidence in the Congressional Record that the rail carriers urged the inclusion of a bus within the reach of Section 13a. Also, Sections 302(c)(1) and (2) concerning motor carriers are never mentioned by the legislators.

The principle urged by the Court below cannot be reconciled with the intent of Congress in enacting subdivision 13a(2). There would be no need for subdivision 13a(2) if 13a(1) had been intended to encompass both an interstate and an intrastate train or ferry; that is, (1) an interstate train or ferry, and (2) an intrastate train or ferry connecting with an interstate bus (or other interstate "operation" of a train or ferry). The scope of the term "operation" could easily be expanded by extending the Court's rule to intrastate trains or ferries connecting with every conceivable mode of interstate connecting transport, public or private, other than a bus. It would be almost impossible

to determine what train or ferry is included by the terms of subdivision 13a(2), for the passenger's subsequent journey, after ending the intrastate part, would have to be followed to determine if the trip were intrastate or interstate. Did Congress intend to provide such an uncertain guide for the federal and state agencies administering Section 13a? The answer must be no.

Summarizing, the rule of the Court below is that the train or ferry is not the crucial factor in determining whether a state or federal agency has jurisdiction. The test of the Court below is to look at the passenger, the ticket, and the terminal in order to find whether it is an interstate or intrastate train. This is not the correct interpretation of the law. It must be presumed that Congress did not act without reason in enacting subdivision 13a(2). By giving subdivision 13a(2) its intended meaning and finding the Congressional intent in the clear words of the statute, it must be concluded that the majority of the Court below incorrectly interpreted the law.

Conclusion.

The Appellants, State of New Jersey and its Board of Public Utility Commissioners, on the basis of the foregoing, maintain that the Court below erred when it ruled that the Appellee acted properly by seeking an intrastate train discontinuance before the I. C. C. on authority of subdivision 13a(1). Further, Appellants respectfully submit that the remedy provided by Congress for Appellee's situation is contained in subdivision 13a(2). For the reasons stated it is respectfully submitted that the judgment of the Court below should be reversed.

Respectfully submitted,

ARTHUR J. SILLS,
Attorney General of New Jersey,
Attorney for Appellants,
State of New Jersey and
Board of Public Utility Commissioners,
State House Annex,
Trenton 25, New Jersey.

Of Counsel,
WILLIAM GURAL,
Deputy Attorney General,
101 Commerce Street,
Newark 2, New Jersey.

Dated: October 15, 1962.

Office-Supreme Court, U.S.
FILED

OCT 18 1962

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 104.

STATE OF NEW JERSEY AND BOARD OF PUBLIC UTILITY COM-
MISSIONERS OF THE STATE OF NEW JERSEY,

Appellants,

v.s.

NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY,
UNITED STATES OF AMERICA and INTERSTATE COMMERCE
COMMISSION,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY.

STATEMENT OPPOSING MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*.

Appellee, New York, Susquehanna and Western Rail-
road Company, respectfully requests that the motion of
Railway Labor Executives' Association, for leave to file
a brief *amicus curiae* on the merits, should be denied for
the following reasons:

1. The motion fails to indicate what facts or questions
of law are claimed not to have been, or reasons for believ-
ing will not adequately be, presented by the parties.

2. The motion fails to disclose the relevancy of any such fact or question of law to the disposition of the case.

3. The applicant Association's interest is such that its special view can contribute nothing to the determination of the question before the Court; if there should be a discontinuance of the three trains involved, as is compellingly indicated by the unending losses in the passenger operation, and the losses, in every year since 1957, in the freight operations as well, it will be quite insignificant to the Association whether the discontinuance is under the procedure of 49 U. S. C. 13a(1) or 13a(2).

4. The proposed brief, which the Association offers if the motion be granted, is superficial, inadequate and will tend to clutter and confuse rather than clarify and aid the discussion. It wholly ignores the admitted fact that the buses are operated under contract with the rail carrier and are to be regulated as railroad transportation under 49 U. S. C. section 302(c), and contains no discussion whatever of the opinion of the majority below.

5. If the present appeal should result in an affirmance of the decision below, that the discontinuance of the passenger trains is governed by 49 U. S. C. 13a(1), such result will not deprive said Association, or any other person having an interest from an opportunity to be heard by the Interstate Commerce Commission on the question whether the Commission should order the operation continued (or, if previously discontinued, restored) for a period not exceeding one year from the date of such order.

6. This appellee is informed that the Interstate Commerce Commission did not "consent" to the proposed brief

amicus curiae, but merely stated that it had no objection thereto, and that the consent of Appellants was not requested and obtained.

For which reasons, this appellee declined to consent to the filing of the proposed brief *amicus curiae*, and believes the present motion should be denied.

Dated: October 17, 1962.

Respectfully submitted,

VINCENT P. BIUNNO,
Attorney for New York, Susquehanna
and Western Railroad Company,
605 Broad Street,
Newark 2, N.J.

LOU. BIUNNO & TOMPKINS,
Of Counsel.

Office-Supreme Court, U.S.

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OCT 22 1962

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 104.

STATE OF NEW JERSEY AND BOARD OF PUBLIC UTILITY COMMISSIONERS OF THE STATE OF NEW JERSEY,

Appellants,

vs.

NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY,
UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY.

STATEMENT OPPOSING MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*.

Appellee, New York, Susquehanna and Western Railroad Company, respectfully requests that the motion of National Association of Railroad and Utilities Commissioners, for leave to file a brief *amicus curiae* on the merits, should be denied for the following reasons:

1. The motion fails to indicate what facts or questions of law are claimed not to have been, or reasons for believ-

ing will not adequately be, presented by the parties, as required by paragraph 3 of Rule 42 of the Supreme Court.

2. The motion fails to disclose the relevancy of any such fact or question of law to the disposition of the case, as required by paragraph 3 of Rule 42 of the Supreme Court.

3. The interest of applicant Association is identical to and not different from that of Appellants, so that the proposed brief *amicus curiae* will in no way contribute to a fuller or clearer understanding of the case or increase the likelihood of a correct decision.

4. The proposed brief fails to deal in any way with the merits and substance of the proposed discontinuance, as distinguished from the matter of procedure by which the same are to be decided, and hence presents no material or argument to justify compulsory continuance of the three trains involved despite the undisputed facts that passenger operations have shown an unbroken chain of operating losses and that since 1957 freight service has also been an operating deficit in each and every year, so as to make discontinuance unavoidable whether the procedure be under 49 U. S. C. 13a(1) or 13a(2).

5. The proposed brief, which the Association offers if the motion be granted, is superficial and inadequate and will be of no assistance to the Supreme Court or to the parties. The Statement of the Case is incomplete and inaccurate and contains no reference whatever to the Record. The argument contains no treatment whatever of the majority opinion below, and fails to discuss the effect of 49 U. S. C. Section 302(c).

6. The resolution of the Executive Committee of the applicant Association, set out at pages 2 and 3 of its motion, discloses that it has misunderstood the purport of the decision below, in that it recites that it was arrived at "by reason of the fact that the train connects with an interstate bus which crosses a state line", whereas in fact the decision below is based on the fact that the bus operation is an intraterminal transfer furnished by Appellee (through its agent) as an integral and complementary part of the train. The bus service is not separate and independent.

7. Appellant notes that the said motion may not have been presented within the time allowed for the filing of the brief of appellants (the party supported), as required by Rule 42 of the Supreme Court, and respectfully requests that the entries in the records of the Clerk be inspected to determine the facts in connection therewith.

For which reasons, this appellee declined to consent to the filing of the proposed brief *amicus curiae*, and believes the present motion should be denied.

Dated: October 19, 1962.

Respectfully submitted,

VINCENT P. BIUNNO,
Attorney for New York, Susquehanna
and Western Railroad Company,
605 Broad Street,
Newark 2, N. J.

LUM, BIUNNO & TOMPKINS,
Of Counsel.

Office Supreme Court, U.S.
FILED

OCT 31 1962

JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1962

No. 104

STATE OF NEW JERSEY AND BOARD OF PUBLIC UTILITY
COMMISSIONERS OF THE STATE OF NEW JERSEY,
Appellants,

v.

NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD
COMPANY, UNITED STATES OF AMERICA, AND INTER-
STATE COMMERCE COMMISSION, *Appellees.*

On Appeal from the United States District Court,
for the District of New Jersey

**REPLY TO STATEMENT OF APPELLEE NEW YORK,
SUSQUEHANNA AND WESTERN RAILROAD
COMPANY OPPOSING MOTION OF RAILWAY
LABOR EXECUTIVES' ASSOCIATION FOR
LEAVE TO FILE BRIEF AMICUS CURIAE**

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Washington 5, D. C.

*Counsel for Railway Labor
Executives' Association*

October, 1962

IN THE
Supreme Court of the United States

OCTOBER TERM, 1962

No. 104

STATE OF NEW JERSEY AND BOARD OF PUBLIC UTILITY
COMMISSIONERS OF THE STATE OF NEW JERSEY,
Appellants,

v.

NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD
COMPANY, UNITED STATES OF AMERICA, AND INTER-
STATE COMMERCE COMMISSION, *Appellees.*

On Appeal from the United States District Court,
for the District of New Jersey

**REPLY TO STATEMENT OF APPELLEE NEW YORK,
SUSQUEHANNA AND WESTERN RAILROAD
COMPANY OPPOSING MOTION OF RAILWAY
LABOR EXECUTIVES' ASSOCIATION FOR
LEAVE TO FILE BRIEF AMICUS CURIAE**

Now comes the Railway Labor Executives' Association to reply to the statement of the appellee New York, Susquehanna and Western Railroad Company opposing the motion of the Association for leave to file a brief *amicus curiae* in the above-entitled case.

The Association regrets the necessity of burdening the Court with a reply to the appellee's statement and would not do so if that statement were confined solely to legal arguments. However, for the first time in the many railroad cases in which this Association has appeared before this Court, either as a party or as an *amicus*, the appellee railroad has seen fit to charge counsel for the Association with misrepresentation to the Court concerning the efforts of the Association to obtain the consent of the parties to the case to the filing of an *amicus* brief by the Association. The Association believes that it cannot let this charge go unanswered.

In its motion (page 2) the Association stated:

"The Association obtained the consent of the appellee Interstate Commerce Commission. However, consent of the attorney for the appellee railroad was requested but refused."

The paragraph in appellee railroad's statement to which the Association refers is paragraph No. 6, which reads as follows:

"6. This appellee is informed that the Interstate Commerce Commission did not 'consent' to the proposed brief *amicus curiae*, but merely stated that it had no objection thereto, and that the consent of Appellants was not requested and obtained."

The facts concerning efforts of counsel for the Association to obtain the consent of other parties to the case for the filing of an *amicus* brief by the Association are set forth in the affidavit of Mr. William G. Mahoney, a member of the Bar of this Court and a partner of the counsel signatory to the Motion of the Association, which affidavit is attached hereto as Ap-

pendix A and the affidavit of Mr. H. Neil Garson, a member of the Bar of this Court and attorney for the Interstate Commerce Commission which is filed herewith. This affidavit shows that the appellee is incorrect when it states that the Association did not obtain the consent of the Interstate Commerce Commission to the filing of such brief, but that the Association was merely informed that the Commission had no objection thereto.

Respectfully submitted,

CLARENCE M. MULHOLLAND
741 National Bank Building
Toledo 4, Ohio

EDWARD J. HICKEY, JR.
JAMES L. HIGHSAW, JR.
620 Tower Building
Washington 5, D. C.

*Counsel for Railway Labor
Executives' Association*

October, 1962

APPENDIX A

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

 No. 104

STATE OF NEW JERSEY AND BOARD OF PUBLIC UTILITY
 COMMISSIONERS OF THE STATE OF NEW JERSEY,
Appellants,

v.

NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD
 COMPANY, UNITED STATES OF AMERICA, AND INTER-
 STATE COMMERCE COMMISSION, *Appellees.*

On Appeal from the United States District Court
 for the District of New Jersey

DISTRICT OF COLUMBIA }
 WASHINGTON } ss.

Affidavit of William G. Mahoney

WILLIAM G. MAHONEY, being first duly sworn, deposes and says:

1. That he is a member of the Bar of this Court and a member of the law firm of Mulholland, Robie & Hickey, with offices at 620 Tower Building, Washington 5, D. C.

2. That the firm of Mulholland, Robie & Hickey is retained as General Counsel for the Railway Labor Executives' Association, an unincorporated association, the membership of which comprises the chief executive officers of the 23 standard railway labor unions and the Railway Employees' Department, AFL-CIO.

3. That the Railway Labor Executives' Association instructed the firm of Mulholland, Robie & Hickey as its General Counsel to file with this Court a brief *amicus curiae* in the above-captioned proceeding.

4. That Mr. James L. Highsaw, Jr., a member of the firm, was assigned to this case and he requested your affiant to seek consent of the parties to the filing of the brief *amicus curiae*.

5. That pursuant to said request your affiant telephoned Mr. H. Neil Garson, attorney for the Interstate Commerce Commission, to determine whether that party would consent to the filing of a brief by the Railway Labor Executives' Association.

6. The substance of the conversation with Mr. Garson was that affiant asked Mr. Garson if the Commission would consent to the Association's filing a brief as *amicus curiae* in said case and that Mr. Garson stated that it would.

7. That thereafter your affiant telephoned Mr. Vincent Biunno, attorney for the appellee New York, Susquehanna and Western Railroad Company, and asked if his client would consent to the filing of a brief *amicus curiae* by the Association. Mr. Biunno in-

formed your affiant that his client would not consent to the filing of such a brief.

8. That in view of the position taken by the attorney for the appellee Susquehanna Railroad, no formal consent was presented to the Interstate Commerce Commission nor was an attempt made to secure the consent of the State of New Jersey or the New Jersey Board of Public Utility Commissioners.

Further deponent sayeth not.

WILLIAM G. MAHONEY

Subscribed to and sworn before me this 10th day of October, 1962.

Notary Public

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Office-Supreme Court, U.S.

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 104.

STATE OF NEW JERSEY AND BOARD OF PUBLIC
UTILITY COMMISSIONERS OF THE STATE OF
NEW JERSEY,

Appellants,

vs.

NEW YORK, SUSQUEHANNA AND WESTERN
RAILROAD COMPANY,

Appellee,

and

UNITED STATES OF AMERICA and INTERSTATE
COMMERCE COMMISSION.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY.

APPELLEE'S BRIEF ON THE MERITS.

VINCENT P. BIUNNO,

*Attorney for New York, Susquehanna
and Western Railroad Company,
Appellee,*

605 Broad Street,

Newark 2, New Jersey.

CHARLES H. HOENS, JR.,

LUM, BIUNNO & TOMPKINS,

Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1962.

No. 104

STATE OF NEW JERSEY AND BOARD OF PUBLIC UTILITY
COMMISSIONERS OF THE STATE OF NEW JERSEY,
Appellants,

vs.

NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY,
Appellee,
and,

UNITED STATES OF AMERICA AND INTERSTATE
COMMERCE COMMISSION.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY.

Statutes and Rules Involved.

In addition to the constitutional provisions quoted in Appellants' Statement under this head, we note the following statutes and rules of the Interstate Commerce Commission (text being reproduced in the Appendix to this Brief):

Interstate Commerce Act, excerpts from §1 (49 U. S. C. §1)

Interstate Commerce Act, §13a (49 U. S. C. §13a)

Interstate Commerce Act, §202 (49 U. S. C. §302)

Rules of Interstate Commerce Commission; 49 Code of Federal Regulations, §1.2, §1.4(c), §1.5(d), §1.19, §1.20, §1.23(a), §1.27(a), §43.1 through §43.8.

Questions Presented.

We would restate the questions as follows:

1. Whether the question of applying §13a(1) or §13a(2) of the Interstate Commerce Act involves anything more than a matter of procedure rather than an issue of jurisdiction under the facts of this case, especially since Appellants have recognized, for the first time on this appeal, that the Commission could have acted under §13a(2) without a new application to the State agency.

2. Whether the District Court correctly ruled that Susquehanna's operation or service, sought to be discontinued, was governed by the procedures of §13a(1), and consequently enjoined permanently the I. C. C. order which dismissed the notices filed with it?

3. Whether the procedures of §13a(1) fail to cover an operation or service which is clearly interstate rail transportation of passengers, merely because the intraterminal transfer of passengers within the terminal area at New York is by special motorcoach service connecting with the trains and crossing the State line?

4. Whether, if the District Court was wrong, it was proper for the I. C. C. to have dismissed the notices on jurisdictional grounds instead of treating the matter as an application under §13a(2), affording such opportunity to the State agency to act initially on the proposed discontinuance as the facts may have required?

Statement of the Case.

In 1953 Susquehanna emerged from a bankruptcy reorganization of 16 years' duration (R. 31), with capitalization reduced from \$42 million to \$16 million, and fixed interest debt reduced from \$12 million to \$5 million (R. 52); in approving the plan of reorganization, the I. C. C. estimated that earnings available for interest and other corporate purposes would exceed \$700,000 annually (R. 52). These earnings were never realized (R. 52). Its major freight customer, the Ford Motor Company, vacated the Edgewater plant served by Susquehanna and relocated in Mahwah, N. J. (R. 53, R. 54). Freight earnings, which had been \$1,148,764 in 1950 (R. 53) declined to a deficit of \$185,045 in 1959 (R. 50). Susquehanna sustained an unbroken line of out-of-pocket losses from passenger operations in every year since emerging from reorganization (R. 50), and since the end of 1957, freight operations have also been at a deficit. (R. 50, R. 32, R. 55).

In April 1956, Susquehanna instituted proceedings before appellant Board (R. 34, par. 6); extended hearings were not concluded until April, 1957 (R. 35, par. 7). At that time the New Jersey legislature passed Senate Concurrent Resolution No. 20 (1957) purporting to declare as public policy that abandonment or curtailment of rail passenger service be denied pending receipt of the report of a bi-state Rapid Transit Commission, and the Board ordered further proceedings suspended (R. 35, par. 8). The New Jersey Supreme Court held the Concurrent Resolution to be ineffective. (*In re N. Y., Susquehanna and Western R. R. Co.*, 25 N. J. 343, 136 A. 2d 408, decided November 25, 1957) (R. 35, par. 9), and in December the Board entered an order permitting some but not all of

the curtailment sought. Susquehanna appealed, and after some seventeen months, secured further relief from the Appellate Division of Superior Court (*Susquehanna, etc. Ass'n v. P. U. C.*, 55 N. J. Super. 377, 151 A. 2d 9, decided May 1, 1959) (R. 35, par. 10). An unnecessary loss of nearly half a million dollars caused by the forced continuance of trains ultimately found not to be required, was suffered as a result of this delay (R. 35, par. 11).

By the end of 1960, Susquehanna's passenger train service consisted of three commuter trains eastbound in the morning, and three westbound in the evening (R. 35, 36, par. 13). Each train consisted of a diesel engine and one passenger car (R. 30). For the year 1960, this operation involved an "above-the-rail" cost of some \$117,000 (crew wages alone being over \$100,000, while total passenger revenue was only \$65,000) (R. 58).

As shown by its suburban time table (R. 45) these trains carry passengers between various New Jersey points (Butler, N. J. being the most westerly, 37.9 miles from New York) and the Port Authority Bus Terminal at 41st St., New York City. Physically, the eastbound passengers leave the trains at Susquehanna Transfer (a transfer point and not a station, no tickets being sold to or from that point) and from there are transferred to the 41st St. Bus Terminal on special contract buses operated for the rail passengers (R. 30, R. 46 to 49). The westbound routine is the same; train passengers only may board the transfer bus at the Bus Terminal and are taken to Susquehanna Transfer where they board the train. The buses connect with the trains in both directions; they do not pick up or discharge any passengers along the way. Susquehanna passengers at Susquehanna Transfer have no option to go anywhere except on the transfer bus eastbound and on the connect-

ing train westbound; there are no other authorized entrances or exits to or from Susquehanna Transfer (R. 47).

As is clear from the footnote to the majority opinion below, Susquehanna carries nearly all its passengers to and from New York City (R. 17, R. 63 to 68, R. 94).

On December 29 and 30, 1960, Susquehanna posted, and on December 30, 1960, served and filed notices complying with section 13a(1) of the Interstate Commerce Act, announcing that the trains mentioned would be discontinued at 12:01 A. M. January 30, 1961 (R. 44). It also filed with the I. C. C. a detailed Statement, as required by its rules, setting out all pertinent facts, including those set out above (R. 29 to 74).

On January 9, 1960, appellants State and Board filed a Petition to Dismiss "without prejudice" for asserted lack of jurisdiction, (R. 75) and on January 18, 1960, without awaiting the expiration of the 20 day period allowed by I. C. C. rules for the filing of a Reply by Susquehanna, the I. C. C. entered an order of dismissal, but not "without prejudice" as Appellants had asked (R. 87, R. 7). Susquehanna nonetheless filed its Reply within the proper time (R. 80), and thereafter an Amended Reply (R. 91) as well as a Petition for Reconsideration (R. 86), which the State and Board opposed. Upon denial of that Petition, (R. 8) the suit below was promptly initiated (R. 1).

At the trial below, defendants the United States and the I. C. C. explicitly recognized that Susquehanna's passenger

* The table there given works out to an average daily total of 245.8 passengers (who make 2 trips each day, one eastbound and one westbound), of which only 28 travel intrastate. The most heavily patronized eastbound train, No. 910, with 126.4 average daily passengers carries only 6.3 passengers intrastate; and the most heavily patronized westbound train, No. 923, with 120.1 average daily passengers, carries only 1.5 passengers intrastate.

service between New Jersey and New York constitutes "interstate rail transportation"; appellants State and Board were silent on the point in their brief, and when questioned conceded that their position in that regard was the same as that of the United States and the I. C. C.

The decision of the District Court was based on the obviously interstate nature of the passenger service involved (R. 17) especially in light of earlier determinations by the I. C. C., to which appellants State and Board were parties, holding that when Susquehanna's trains are at Susquehanna Transfer, they are within the carrier's terminal area at New York; that the transfer of passengers between that point and the 41st Street Bus Terminal, by special contract bus, is an intraterminal transfer, is required by the Act to be considered as performed by Susquehanna, and is to be regarded and regulated as rail transportation (R. 46 to 49). This statutory scheme, expressed in section 202(c) of the Act (49 U. S. C. section 302(c)) was in effect when Congress enacted the 1958 Transportation Act which included the provisions now referred to as section 13a of the Act. The majority found that both factually and as a matter of law, the specific train-bus arrangement in this case was a single, integrated service, the transfer within the terminal area provided by Susquehanna being incidental to and part of the rail service (R. 22). The majority opinion also rested on the entire history which led to the enactment of section 13a, and held that it was to be read as remedial legislation, and not with unreasonable narrowness and strictness (R. 19 to 22).

The dissenting opinion adopted the position taken by appellants State and Board, looking at the single word "train", and giving no effect to the whole phrase: "the discontinuance or change . . . of the operation or service of any train . . ." (R. 23 ff).

Summary of Argument.

A. By the enactment of section 13a in 1958, 49 U. S. C. 13a, the Congress exercised its power to regulate interstate and foreign commerce by investing the I. C. C. with paramount authority to deal with the change or discontinuance of the operation or service of a train or ferry by a railroad engaged in interstate commerce. The authority so invested applies to both interstate and intrastate operation or service; but different procedures were provided for interstate and intrastate matters.

Under §13a(1), which applies when the operation or service is interstate, the carrier files with the I. C. C. (and also posts and serves) a 30 day notice of the proposed discontinuance or change, and the authority to do so is granted directly by the statute unless the I. C. C., upon making the requisite findings, orders service continued for up to one year. The I. C. C. is also empowered to order interim operations pending investigation and hearing, but not for a period longer than four months from the noticed date.

Under §13a(2), which applies when the service is intrastate, the carrier may make the change or discontinuance if granted permission by the I. C. C., after full hearings and on making the requisite findings, on petition for such permission. This permission may be granted by the I. C. C. (a) if the constitution or statutes of the State prohibit the discontinuance or change; or, (b) if the State regulatory body denies, in whole or in part, an application for the discontinuance or change; or (c) if the State regulatory body does not act finally on such an application within 120 days after its presentation.

Hence, since the I. C. C. is given authority to act in either instance, the question whether a particular operation

or service may be changed or discontinued under one provision or another does not involve a question of "jurisdiction" in the traditional sense, and should a carrier initiate an effort to discontinue or change its operation or service under the wrong provision, the proper course is not to "dismiss for lack of jurisdiction" but to take such final action on the merits as the facts may require, with appropriate correction of the procedure.

Appellants have now represented to this Court (in their Brief on Susquehanna's motion seeking suspension or modification of a temporary injunction pending appeal granted by the District Court), that the State agency had already failed to grant Susquehanna the permission to discontinue the subject trains in its last application before the §13a(1) notices were filed, and that the I. C. C. had authority to act under 13a(2) without Susquehanna's having to make a new application to the State agency as a prerequisite to authorization to discontinuance under §13a. This fact excludes any possibility of "lack of jurisdiction" in the I. C. C.

B. The long history of the serious impact, on interstate transportation by railroad, of obstructive attitudes in some States led Congress to enact §13a. As the power to deal with interstate commerce is federal, its exercise by a statute is not to be confined by a narrow construction for the purpose of preserving the reserved power of the States. As the Act itself, and the section in issue, are remedial legislation, they are to be liberally construed.

Since 1940, the Act has expressly provided in §202(c) that transportation by motor vehicle, by or for a railroad, for intraterminal transfer of passengers (a) is not to be governed by the Motor Carrier Act of 1935, and (b) is to be regulated in the same manner as transportation by railroad,

49 U. S. C. §302(c). As Susquehanna's passenger operation and service are almost entirely for interstate commutation between New Jersey and New York, and as its terminal is New York, the discontinuance or change of such operation or service is governed by §13a(1). When Susquehanna's trains are at Susquehanna Transfer, they are within the carrier's terminal area at New York, and its passengers are transferred, within that terminal area, to and from the Port Authority Bus Terminal in Manhattan by special motor coaches that carry only the rail passengers. The motor coaches are operated on schedules to meet the trains, and for no other purposes and do not pick up or discharge passengers along the route. They serve precisely the same functions the trains would if it were physically possible for them to continue to New York. The motor coach service so provided by Susquehanna (in fulfillment of tickets it issues for transportation to and from New York) is an integral part of the train operation, and is used by some 90% of Susquehanna's passengers for interstate commutation. These interstate passengers cannot get to and from New York on Susquehanna's line except by the use of the motor coach transfer operation, and it is accordingly to be treated, in contemplation of law, in the same fashion and by the same provisions as apply to trains.

The identification of a carrier's terminal area is a question of fact to be decided on the merits of each case, and it has previously been decided in earlier proceedings to which Appellants were parties, and which are *res judicata*, that Susquehanna Transfer is within the carrier's terminal area at New York.

C. The contention that the word "train" is to be taken literally, physically and narrowly, as urged by Appellants, will lead to the absurd result that Susquehanna could not

effectively discontinue its interstate passenger service under either §13a(1) or §13a(2). This is because if proceedings were had under §13a(2), as Appellants say they should, and if Susquehanna secured a permissive order, it could only apply to the "trains", and it would be unable to discontinue the transfer bus;

§13a(2) uses exactly the same language as §13a(1) in this connection, and the order (by Appellants' construction) could not cover the bus (a) because a "bus" is not named and (b) because the bus is surely not intrastate. The result would be absurd because all instances of operation and service of trains by railroads engaged in interstate commerce are covered by the combination of the two paragraphs of the section, and because Congress could hardly have intended that the bus be required to operate when there are no passengers to ride it.

D. The legislative discussions in the course of consideration and enactment of this section do not address themselves to the kind of problem involved in this case, and are of little aid, if any, in the search for legislative intent. All of the excerpts reproduced in the record took place in relation to earlier versions set out in the House and Senate bills, and before the final text was reported out of Conference Committee and enacted.

E. The particular construction incidentally made by the I. C. C. in entering the order of dismissal is not an administrative interpretation which can affect the decision here; construction of the statute is for the court, and decision of the merits on the facts is for the I. C. C.

ARGUMENT.

POINT ONE.

The issue presented by this appeal does not really involve a question of "jurisdiction" of the I. C. C., but merely a question of procedure.

This is a simple case. Its decision will hardly be difficult and the result, whatever it may be, is unlikely to be notable for either establishing or altering any significant rule or principle of law.

This is clear from the Commission's own rules, the pertinent parts of which are set out in full text in the Appendix to this brief. We note here that the "Petition" under the §13a(2) procedure is to set forth the same content and information as is required for a "Statement" for §13a(1) procedure, with only slight variation. Compare 49 C. F. R. §43.6 with 49 C. F. R. §43.4(b) and 43.5. The form of execution is the same for both under 49 C. F. R. §43.7, as is the number of copies under 49 C. F. R. §43.8. The rules also contain the salutary direction that:

"The rules in this part shall be liberally construed to secure just, speedy, and inexpensive determination of the issues presented." 49 C. F. R. §1.2. (Cf. Fed. Rules of Civ. Proc., Rule 1).

Amendments are permitted, under 49 C. F. R. §1.20, and two or more "grounds of complaint" may be joined so long as they concern the same principle, subject or state of facts. 49 C. F. R. §1.27(a).

And the admission by Appellants (made for the first time in their representations to this Court in their separate Brief in opposition to Susquehanna's application for an

order to suspend or modify the temporary injunction), that the Commission has the present authority to enter an order under §13a(2), as the result of the partial denial of Susquehanna's previous application for complete discontinuance of these same trains, *without again applying to the State agency in the first instance*, establishes beyond question that the Commission was wrong in dismissing for "lack of jurisdiction", as well as that the disagreement is merely one about procedure.*

The case is simple and its decision not difficult because the question raised by the appeal is whether Susquehanna, which transports commuters between New Jersey and New York, may discontinue its three trains by following the procedure of 49 U. S. C. 13a(1), or whether it may do so only by the procedure of 49 U. S. C. 13a(2).

If the selection of procedure is to be governed by the functional nature of the operation or service, recognizing that Susquehanna does carry all but a few of its daily passengers between two States (R. 17, footnote), the judgment of the District Court will be affirmed.

On the other hand, if function is ignored, and if the operation or service involved is regarded as wholly intra-state, the procedure for discontinuance will be that of 49 U. S. C. 13a(2).

In any case, the proceeding will be but another unhappy example of the triumph of legalism over substance, for its final settlement will have involved two determinations by

* The representation made to this Court by Appellants in the brief referred to is as follows:

"Furthermore, Section 13a(2) does not designate the time within which a matter may be brought to the I. C. C. after proceedings before a state regulatory agency. Hence, there is relief available to the Appellee before the I. C. C. by petitioning that body from the Board decision in Docket No. 5912-11884 • • • where the Appellee was granted only a portion of the relief it sought."

the Interstate Commerce Commission, a review by a statutory 3-judge district court, and a final ruling by the highest court in the land. All of this will be for the purpose of resolving a question of procedure. There will have been some two years consumed in the process, during which the service involved will have been continued in the face of the undeniable facts of steady loss, not only from the operation involved, but from all operations, passenger and freight.

We say that the dispute involves a question of procedure, and not one of jurisdiction, because while the argument of Appellants throughout is constructed on a theme which they characterize as a conflict of jurisdiction in the dichotomy of national and state regulatory agencies, the statute is plain in its vesting of paramount authority in the national regulatory agency, in both subdivisions of the section.

The procedural difference is this: in cases governed by section 13a(1), the authority to discontinue flows from a direct grant from Congress to the carrier, without the permissive order of any regulatory agency, and the Commission may prevent its exercise by an order to continue service; in cases governed by section 13a(2), the authority to discontinue resides in a permissive order of the Commission which can be entered only after a local agency has either declined to enter such an order or has failed to act, after 120 days.

Not only is this plain from the text of the statute, but it was expressly so decided in the Second Ferry Cases, *State of New Jersey, et al., v. United States, et al.*, (two cases), 168 F. Supp. 324 and 342 (D. C. N. J. 1958), *aff'd*, 359 U. S. 27, *reh. den.* 359 U. S. 950 (1959).

There is accordingly some semantic confusion in the argument as well as in the prior proceedings. There never

really was any question whether the Commission had "jurisdiction". Under the statute, there was no "application", in the traditional sense, but a posting and serving of notices of proposed discontinuance and a filing of the notices (together with a "Statement" required by regulation) with the Commission so that it might undertake the intended investigation and hearing and make a determination of the elements of (a) public necessity and convenience and (b) burden on interstate commerce.

Under both 13a(1) and 13a(2), federal jurisdiction is paramount, whether the operation or service involved be interstate or intrastate. Substantively, the two provisions are together intended to erase the ability of State agencies to delay and obstruct prompt and consistent decisions on the merits of proposed changes or discontinuances. In both cases, opportunity for presentation and consideration of matters of local concern is provided for in the proceedings before the I. C. C.

That intention was frustrated in the present case by the insistence of the State agency on technical assertions going to "jurisdiction" (actually, merely procedure) and by the unwillingness of the I. C. C. to discharge its statutory duty by acting in the matter on the merits while giving full scope to the concept of accommodation between federal and state interests. Hence, instead of a cooperative endeavor to achieve a solution to an obviously serious problem, we find the same kind of ceremonial dance as is exemplified by *Alabama Public Service Commission v. Southern Railway Co.*, 341 U. S. 341 (1951).

Yet, since federal jurisdiction is clearly intended to be the final solvent under both parts of the section, the I. C. C. chose not to employ procedural courses which would have reached the merits and, in the light of the overwhelming

strength of the facts, would have tended to make the present issue one of secondary or academic interest only.

The real question before the Commission was whether the matter of discontinuance was to be dealt with by the procedure of section 13a(1) or that of 13a(2). For both procedures, findings in respect to the same two elements are prescribed. For both procedures, the Commission was free to assign the matter for initial inquiry by the State agency, in the manner described with approval in *Colorado v. United States*, 271 U. S. 153, 167 (1926). There the Court, in discussing the procedure for abandonments under section 1(18) (under which the questions are closely analogous), observed that every projected abandonment of any part of a railroad engaged in both interstate and intrastate commerce may conceivably involve a conflict between state and national interests, and that:

"In practice, representatives of state regulatory bodies sit, sometimes, with the representatives of the Commission at hearings upon the application for a certificate. Occasionally, the Commission leaves the preliminary enquiry to the state body. And always consideration is given by the Commission to the representations of the state authorities." (Emphasis added).

More recently, a similar arrangement was recognized as proper and desirable in *Woodruff v. United States*, 40 F. Supp. 949 (D. Ct. Conn. 1941). There, an abandonment application under section 1(18) was assigned by the I. C. C. for hearing at Hartford "before the Public Utilities Commission of Connecticut." Official reporters of the I. C. C. recorded and transcribed the evidence and transmitted it to the I. C. C., and both the state agency and the I. C. C. made independent findings.

The obviously preferable course, for a prompt and efficient administration of justice, would have been for the Commission to assign the matter for preliminary inquiry by the local agency and then make the factual determinations specified by the statute. If those determinations were such as to support the proposed discontinuance, it could have entered an affirmative order permitting discontinuance. This would have rendered moot the incidental dispute in respect to procedure.

Such a course would have rendered quite immaterial the wasteful dispute which has been generated by its summary dismissal of the notice, without hearing or opportunity for hearing even on the motion to dismiss, not to mention the merits (R. 89, paragraph g), and would have prevented the further depletion of Susquehanna's substance in the continued operation of a service which cannot be supported on any theory.

It will be observed that this assumes a denial or refusal to act on the part of the state agency. The assumption is reasonable because, having all the necessary facts in the Statement (R. 29 to R. 74), and the broad power and duty of general supervision and regulation over all public utilities entrusted to it by N. J. Rev. Stat. 48:2-13, it was free to take the local action which it insists is its "right" if it was sincerely desirous of exercising it. Nor is N. J. Rev. Stat. 48:2-24, as amended by L. 1959, ch. 55, any obstacle. That act forbids railroads maintaining passenger service from discontinuing, curtailing or abandoning such service without obtaining permission from the board, after notice and hearing. (The amendment, it is interesting to note, was enacted the year after enactment of section 13a). Insofar as the service between the Transfer and Manhattan is concerned, the law is settled that the State has no power

to act at all, as the service goes beyond the state boundary. *Erie R. R. Co. v. State*, 51 N. J. Super. 61 (App. Div. 1958).

Viewed in this perspective, it is plain that the litigation which has ensued is really on an artificial issue which could have been entirely avoided if the I. C. C. had not chosen to abdicate its functions by an order whose nature is typical of the technicalities of ancient common law pleading at their worst. It is a source of some dismay to find, at this late date, that not only do such obfuscations over technicalities persist, but that they are practiced by administrative agencies intended to function without the confinement of rules that have traditionally subjected our courts to criticism.

Thus, it is plain that the argument of the Appellants is not really one over "jurisdiction", but one over mere procedure.

It follows that on this appeal the choice is not one between affirmance and reversal. If the judgment of the District Court was right, it should be affirmed and that will end the matter unless the Commission determines that there should be an order for a 1-year continuance of service. If, on the other hand, the District Court was wrong, and the matter is to be governed by the procedure of 13a(2), then there should be, not a reversal but a modification, with a remand under which both the state agency and the Commission may act according to the arrangements approved in *Colorado v. United States*, *supra*, and the matter concluded on the merits.

Of course, it may be that in the event of an affirmance, Appellants may conclude not to proceed further and may not request the Commission to consider the entry of a 1-year order of continuance. On this question, Appellants will be better able to inform this Court of their intentions.

The material set out in the Statement (R. 29 to R. 74), in the light of the facts developed since its preparation, which are routinely reported to both the state agency and the Commission, may well satisfy them that while there may be a dispute over procedure, there is no dispute over the merits.

POINT TWO.

The District Court correctly decided that Susquehanna followed the proper and applicable procedure by acting pursuant to section 13a(1) rather than section 13a(2).

We here take up the matter of construing the statute. Noting that its construction involves a matter of procedure, the analysis to follow will nonetheless assume, for the purpose of argument only, that the issue is "jurisdiction".

Appellants argue, in effect, that section 13a as enacted discloses a congressional intent not to exercise the federal power in respect to intrastate trains, and that their regulation is one of the powers reserved to the States. They argue that, in consequence, the statute is to be strictly and narrowly construed to preserve the exercise of state authority, and that this objective can only be achieved by taking the words "train" and "ferry" in their physical and literal sense only, rather than in their functional sense, and by ignoring the disjunctive "operation or service" (Emphasis added). They are also compelled to reject the applicability of 49 U. S. C. §302(c). The argument is unsound and cannot be supported.

The *power* to deal with interstate commerce is in its nature federal, and it may be exercised by the States only because of non-action by Congress; once this is recognized,

as it was in *Western Union v. Boegli*, 251 U. S. 315, 316 (1920), it follows that the Interstate Commerce Act (or amendments to it bringing new subjects under the administrative control of the Commission, as was the case in *Western Union v. Boegli*) is not to be "narrowly construed so as to preserve the reserved power of the State over the subject in hand." *Idem*.

Even before the enactment of section 13a, it was well settled law that the Interstate Commerce Act applied to carriers engaged in the transportation of persons by railroad from state to state, "including terminal facilities of every kind used or necessary in the transportation" of persons, and including "cars and other vehicles"; and also:

"That the service is performed wholly in one State can make no difference if it is a part of interstate carriage".

United States v. Union Stock Yard, 226 U. S. 286, 303-304 (1912); and see, also, *California v. Taylor*, 353 U. S. 553, at 554 and 561 (1957) holding that the State Belt Railroad, though located entirely within the State of California, was engaged in interstate commerce and was governed by the Interstate Commerce Act.

And there is also the admonition that:

"It must be kept always in mind that the Interstate Commerce Act . . . is remedial legislation requiring a liberal interpretation to effect its evident purpose."

Interstate Commerce Commission v. Weldon, 90 F. Supp. 873 (D. C. Tenh. 1950), aff'd on op. 188 F. 2d 367 (C. A. 6th, 1951), cert. den. 342 U. S. 827 (1951).

This court held, in *Chicago v. Atchison, etc. Co.*, 357 U. S. 77, 87-88 (1958), that:

"National rather than local control of interstate railroad transportation has long been the policy of Congress. It is not at all extraordinary that Congress should extend freedom from local restraints to the movement of interstate traffic between railroad terminals. Serious impediment to the efficient and uninterrupted flow of this traffic might well result if the city could deny the railroads the right to transfer passengers by their own vehicles or by those of their selected agents."

And, of course:

"Any state law which conflicts with the federal rule governing interstate carriers" [the Hepburn Act, 49 U. S. C. §1(7)] "must therefore give way by virtue of the Supremacy Clause" [U. S. Const., Art. VI.]

Francis v. Southern Pacific, 333 U. S. 445, 450 (1948).

Turning, then, to the statute to be construed, we find that it authorizes "any carrier or carriers subject to this chapter", to file with the Commission, mail to the Governor of each State affected, and post in every station served, at least 30 days' notice of a proposed discontinuance or change in the operation "or service" of an interstate train or ferry. Upon the expiration of the notice period, the carrier may discontinue or change the noticed operation or service "except as otherwise ordered by the Commission pursuant to this paragraph", notwithstanding the laws or constitution of any State, or the decision or order of, or the pendency of any proceeding before any court or State authority to the contrary.

The Commission is then authorized (1) to order a continuance pending hearings "but not for a longer period than four months" beyond the noticed discontinuance

date, and, (2) if it finds that the operation or service (a) is required by public convenience and necessity and that (b) it will not unduly burden interstate or foreign commerce, it may order a continuance in whole or in part (or a restoration if already discontinued) for a period not to exceed 1 year from the date of the order.

Beyond dispute, Susquehanna is a "carrier subject to this chapter". That fact is clear from the declarations of 49 U. S. C. §1, as Susquehanna is a common carrier engaged in the "transportation" by "railroad" of persons from one State to another. "Transportation", by 49 U. S. C. §1(3)(a) includes "locomotives, cars, and other vehicles", and all "facilities of shipment or carriage", irrespective of ownership; while "railroad", by the same clause, includes all "terminals and terminal facilities of every kind used or necessary in the transportation of persons."

What about the shuttle bus? Motor vehicles were not regulated at the federal level until the enactment of the Motor Carrier Act of 1935, 49 U. S. C. §301 ff. In enacting that law, Congress said two things about the kind of shuttle buses involved here:

... first, it said *negatively* that the provisions of the Motor Carrier Act "shall not apply" to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to Part I . . . "in the performance within terminal areas of transfer, collection or delivery service", and

... second, it said *affirmatively* that "such transportation" [i.e., by motor vehicle] *shall be considered to be performed by such carrier, . . . and shall be regulated in the same manner as the transportation*

by railroad, ... to which such services are incidental.”
(Emphasis added).

From these provisions alone, we submit, an ordinary construction leaning neither toward nor away from federal or state interests requires the conclusion that Susquehanna properly proposed the discontinuance of the “operation or service” of a train from a point in one State to a point in another. The intent of Congress is clear: when a rail carrier employs motor buses to transport passengers within a terminal area, it has commanded that such transportation “shall be regulated” in the same manner as the transportation by railroad to which the transfer service is incidental. The provision is mandatory, leaving no room for exception, and it was part of the law when section 13a was enacted. Its application here requires nothing more novel than the concept, daily applied by every lawyer and judge, that the bus is to be regarded or considered as though it were a train; i.e., in contemplation of law, Congress has declared that it is.

The underlying principle is a simple one of broad application. It has been applied to other subjects as well, as in the ruling that the movement of goods by an air carrier, to and from and between airports, by motor vehicle, is “air transportation”. *City of Philadelphia v. Civil Aeronautics Board*, 289 F. 2d 770 (C. A. D. C. 1961).

Of course, the question of defining a terminal area and of deciding whether a given operation is within it or is a line haul is ordinarily a question of fact to be decided on the merits of each case, *United States v. Elgen*, 98 F. 2d 264, 266 (C. A. D. C. 1938), but in the case now before the court there is no such question of fact. The very point has been decided several times by the Commission in proceedings involving this very bus transfer service, and to

which Susquehanna and Appellants were parties. These are set out in the Statement filed below and need not be reprinted here. (R. 46 to R. 49 in Exhibit 2 to Statement). It is sufficient to note here that the excerpts there presented make it clear that, as a matter of *res judicata* between the parties, the bus service is an intraterminal transfer of passengers in aid of, and as an incident of, the rail service; that when Susquehanna's trains are at North Bergen, N. J. (Susquehanna Transfer), they are within Susquehanna's "terminal area at New York in respect of both freight and passenger service" (emphasis added), as well as that such service is within the scope of §202(c) of the Act (49 U. S. C. §302(c)).

Lest this be claimed to consist of no more than an invention of counsel, it will be worth a brief excerpt from the landmark decision in *New York Dock Railway v. Pennsylvania R. Co.*, 62 F. 2d 1010 (C. C. A. 3d, 1933), where the court described the Pennsylvania Railroad as

"a common carrier operating a line of railroad whose eastern terminus *physically* is at the New Jersey waterfront opposite the city of New York *but actually—by the use of car floats and force of statute—* at stations across the river on the waterfront of Manhattan, Brooklyn, the Bronx, and other boroughs within the commercial area known as the port of New York." (62 F. 2d at 1011) (Emphasis added).

This condition, whereby the great Eastern railroads built their yards, wharves and piers on the New Jersey side of the Hudson River, and completed their transport into New York City by means of whatever device was most suitable and available for crossing the river, was recognized in *United States v. Elgen*, 98 F. 2d 264 (C. A. D. C. 1938), and is of course so well and widely known that any disput-

ing it would hardly be *bona fide* or colorable. Nor are the reasons why the "New York" terminals of these railroads extend to and embrace the facilities in New Jersey either obscure or mysterious. Historically, the Hudson River has been considered a vital part of the military defenses of the nation. In almost any other location, and under almost any other circumstances, the Hudson River would have been spanned, decades ago, by the low-level, inexpensive railroad bridges found ~~thru~~ across other great rivers of the world. So, the requirement that the largest military vessels be capable of sailing the Hudson has limited its crossing to surface vessels and to tunnels for the most part. The George Washington Bridge, the first constructed across the lower reaches of the Hudson, was built for motor vehicles; even its "second deck", originally intended for rail line service, was only this year completed—but for motor vehicles. The Brooklyn-Staten Island Bridge, now under construction across the Narrows, is the newest one authorized since the Tappan Zee at Tarrytown; a high level bridge, its relatively steep grades could never be negotiated by conventional trains. And the tunnels, first the rail tunnels of the Pennsylvania and the H. & M. Tubes, and then the vehicular Holland and Lincoln Tunnels, offered such appeal and advantage as to bring the ferryboat (once the major means of crossing) to near demise.

Thus, were it not for these physical and military considerations, it is not improbable that inexpensive bridge crossings of the Hudson may have made it practical and feasible to take New York trains physically into New York at all necessary points, at least until the spawning of the internal combustion engine and automobile completed the cycle of development of the self-propelled vehicle which, it proved, had only temporarily been hybridized into the rail-

road by such influences as the English Red Flag Act and its American counterparts.

It is for considerations such as these that railroads having their terminals and destinations "at New York" were considered to have their lines extend "into" New York by means of such non-rail means as cat floats and lighters; that Susquehanna found it more feasible and useful to make the passenger transfer by contract motor coach via the Lincoln Tunnel in no way alters the application of the principle.

As heretofore observed, the number of intrastate passengers is very small; most of the users are transported to and from New York (R. 17, footnote). Hence it is idle fiction to talk about these trains as "intrastate". At most, what might be said is that they carry a few intrastate passengers along with the interstate. Their character is such that even if Congress is to be taken as having intended a reservation to the States in the sense urged by Appellants, it would hardly apply to these trains and their passengers. They argue that "though even an intrastate train may transport passengers who intend to proceed across the State line", it is the movement of the "train or ferry", not the movement or intention of the passenger, which is the determining factor (Appellants' Brief, pp. 14-15). But that is not this case. This case is one where, not only do the passengers *intend* to cross the State line, not only is their *movement* across the State line, but it is the *railroad itself* which transports them across the line, on tickets having the other State as their destination, and by means which Congress has commanded be regulated as "transportation by railroad". See the excerpt from the tariff, specifying the interstate ticket needed (R. 16).

United States v. Elgen, 98 F. 2d 264 (C. A. D. C. 1938), mentioned above, is of especial interest because it involved the use of a vehicle that ran on tracks and, by means of rubber-tired wheels that could be lowered into place, could also run on city streets. When it was proposed to have this vehicle run from the previous rail terminal outside the District of Columbia into the District itself, it was held in that case that as a matter of fact the District was outside the line's "terminal area" and that a certificate of convenience and necessity was required for the new service, not because of the vehicle's metamorphosis into a bus but because the run would amount to a "line haul". In the same year, the certificate was issued, but the issuance was challenged and enjoined; before decision on the ensuing appeal, the proponent of the service had to abandon the arrangement because of financial losses. *Arlington, etc. v. Capital Transit Co.*, 109 F. 2d 345 (C. A. D. C. 1939). In any event, Congress set that kind of question at rest by the enactment of the act of September 18, 1940 (54 Stat. 920), which is now 49 U. S. C. § 302.

Of the two choices, then, between the meanings to be ascribed to the provisions of section 13a, it is plain that the one which would cover Susquehanna's operation under the provisions of section 13a(1), is the proper one. "Such a reading of the statute does violence neither to semantics nor to common sense." *Callanan v. United States*, 364 U. S. 587, 598-599 (1961).

POINT THREE.

The construction urged by Appellants would lead to an absurd result, and if accepted would not allow the proposed discontinuance of service under either 13a(1) or 13a(2).

Prior to the enactment of section 13(a), the accepted view was that while complete abandonment of a line of

railroad, or part of a line, could only be accomplished pursuant to a Certificate of the Commission under section 1(18), whether interstate or intrastate, changes or curtailment of services were not covered by that section.*

Under that view, one method for achieving a change or discontinuance of interstate passenger service (whether a single train or all), was to apply to the regulatory agency in each of the states through which the passengers to be affected were transported. If those proceedings culminated in unsatisfactory orders, or inconsistent orders, the only remedy was by review through the state courts. If federal constitutional questions arose, they presumably would permit of review by the United States Supreme Court.** In any event, the I. C. C. had no part or function in the process.

As an administrative regulatory system, this arrangement proved to be unwieldy and unworkable. There were no time limits to the agency hearings. Their review in the courts was complicated and slow. Separate proceedings in separate states not infrequently resulted in conflicting

* In the *First Ferry Cases*, *Board of Public Utility Commissioners v. United States*, (two cases), 158 F. Supp. 98 and 104 (D. Ct. N. J. 1957), prob. juris. noted 357 U. S. 917 (1957), dismissed as moot, 359 U. S. 957 and 982 (1959), it was decided that even though a railroad sought complete discontinuance of passenger service via one avenue on its line of railroad, that did not constitute an "abandonment" which the Commission could authorize under §1(18). The point, however, seems never to have been squarely decided by the Supreme Court, so far as our research has disclosed. See *Banta v. United States*, 152 F. Supp. 59 (D. Ct. N. J. 1957), dismissed 355 U. S. 33 (1957), aff'd, 355 U. S. 34 (1957), for an example of still another method unsuccessfully attempted in the search for a remedy from the adamant attitude of the New Jersey regulatory agency.

** For example, where forced continuance amounted to a taking of property without compensation or without due process of law, as recognized by *Penna-Reading Seashore Lines v. P. U. C.*, 5 N. J. 114, especially at 124-125 (1950). Query: whether the principle of *Griggs v. County of Allegheny*, 369 U. S. 84 (1962) might provide an alternate means for securing a remedy.

results. Even when changes and discontinuances were allowed, the process was so long that the interim losses often deprived the carrier of the financial ability to continue to furnish the curtailed service. (See the excerpt from *Transit Commission* at R. 22).

It was in this frame of reference (only briefly outlined above) that section 13a was proposed. In its original form, there can be no doubt of the intent that it was to apply to all cases of change or discontinuance on an interstate line of railroad, even though the change or discontinuance affected wholly intrastate service. The pattern was like that of section 13a(1), namely, a direct authorization from the Congress to the carrier to effectuate the change or discontinuance upon the expiration of the time set by notices posted, filed and served, with authority in the I. C. C. to prevent its exercise upon making the requisite findings.

In the course of consideration, this proposed section was divided into two paragraphs: 13a(1) and 13a(2). The main object remained the same in both, namely, that the I. C. C. should have the final authority, but where the operation or service was wholly intrastate, the I. C. C. was not to act until the state agency had either denied the relief, or had failed to act for 120 days (essentially, 4 months).*

* It is worth observing here that the coverage of the version enacted is broader than that first proposed. Under the original proposal, an operation or service that was wholly intrastate was covered only if it was on a "line of railroad" that extended across a State line. As enacted, such an operation or service may be discontinued on the order of the Commission under section 13a(2), even though the line of railroad itself is wholly intrastate as well; the only limitation on Commission power is that the carrier be "subject to Part I", i.e., engaged in interstate commerce. Thus, an operation or service of the kind carried on by the State Belt Railroad, described in *California v. Taylor*, 353 U. S. 553 (1957) could be discontinued under order of the commission by the procedure set out in section 13a(2), but could not have been so discontinued under the original version as that "line of railroad" was entirely within California.

Putting to one side, for the moment, the different procedures outlined by §13a(1) and §13a(2), it is plain that the scope of the two provisions, taken together, embraces at least every instance that would have come within the coverage of the original version. Insofar as combined coverage is concerned, the common elements are those of (a), public convenience and necessity and (b) the existence of an undue burden on interstate commerce. That is to say, any change or discontinuance of passenger train service by a rail carrier engaged in interstate commerce, will inevitably be found to fall within either §13a(1) or §13a(2). Hence, any construction which would result in having a change or discontinuance fall under neither one would obviously be absurd and not within the underlying intent of Congress in enacting the entire section.

Indeed, Appellants appear to concede that discontinuance of the operation or service in dispute would be proper if it had been sought under §13a(2) (Appellant's Brief, at p. 8).*

* The concession is ambiguously qualified: "This railroad's relief, if it be entitled to any, should flow from subdivision 13a(2)." In his dissent below, Circuit Judge McLaughlin does not even concede coverage under §13a(2). (R. 23-26). We note, with some bewilderment, that Judge McLaughlin also dissented in the Second Ferry Cases, after §13a had been enacted.

Even so, under New Jersey decisions, Susquehanna would be faced with enforcement proceedings to compel continued operations ordered by the Board—even across a State line—until its orders were reversed on appeal in the State courts, *State v. N. Y. Central R. Co.*, 52 N. J. Super. 206 (Ch. Div. 1958); this would generate still another chain of litigation and confront Susquehanna with the kind of dilemma referred to by Mr. Justice Black in his dissent in *Uphaus v. Wyman*, 364 U. S. 388, 396 (1960), quoting Lord Mansfield:

"My Lords, this is a most exquisite dilemma, from which there is no escaping; it is as bad persecution as the bed of Procrustes: If they are too short, stretch them; if they are too long, lop them."

However, under the construction they advance, it is easy to see that section 13a(2) would not apply at all. The reason for this is that their construction depends entirely upon a narrow and literal reading of the words "train" and "ferry", and upon a disregard of the disjunctive "operation" or "service" as well as of the underlying intent and of the command of 49 U. S. C. §302(c).

Under their construction, discontinuance of this service cannot be accomplished under 13a(1) because the "train" does not cross a state line, and because even though the intraterminal transfer bus obviously does, they argue that the section mentions only a "train" or "ferry" and does not apply to a "bus". This argument inevitably would make section 13a(2) also inapplicable. This is because under section 13a(2), if it be assumed that Susquehanna could apply for discontinuance of the "train", it would still be unable to apply for discontinuance of the "bus". The phrasing of 13a(2) is identical, in this regard, to that of 13a(1). Hence, if the course suggested by Appellants were to be followed and if Susquehanna were to secure the permission sought, it might secure permission to discontinue the operation of the "trains", but since that permission could only apply to the "trains", it would be obliged to continue the operation of the "bus". The absurdity of this course is patent. The buses are operated to transport train passengers across the river; without "trains" there would be no passengers to transport. Yet, the buses could not be discontinued under 13a(2), not only because (as appellants argue) "buses" are not mentioned, but also because they run from a point in one State to a point in another State (which 13a(2) does not cover).

The only other theory on which appellants could construct an argument to avoid this patent absurdity would

be that Susquehanna needs no permission from anyone, State or federal, to stop operating the shuttle bus while continuing to operate the train. Appellants have never contended or conceded that the bus could be so discontinued. The reason is obvious. Without the intraterminal transfer bus, eastbound passengers going to New York would be stranded at Susquehanna Transfer in the morning, and westbound passengers would be unable to get from Manhattan to Susquehanna Transfer in the evening. So the trains would run with only local passengers, who compose only about 10% of the already light patronage.

The decision of the District Court is accordingly sound. It recognizes that the "service" is from a point in one State to a point in another State. It recognizes the obvious difference in sense between "service *by* a train" and "service *of* a train." It recognizes that the bus service is incidental to and integral with the train; it "complements" the train. The two are but the component parts of a single integrated whole. (R. 22).

Without relying in any way upon any rule of construction that would lean toward federal authority because interstate commerce is clearly involved and because Congress has expressly placed final authority in the Commission, but looking at the facts and the statute for ordinary sense and meaning, it is plain that this integrated service must be taken as a "well-coordinated and smoothly functioning plan for continuous cooperative transportation services" between New Jersey and New York; Susquehanna does not use the buses "merely on a sporadic or occasional basis." The transfer bus "plainly is just as essential and necessary, and as available for that matter", as though Susquehanna had the physical means and legal title to move its trains across the Hudson River into Manhattan. The

circumstances show that the trains and the intraterminal buses "operate as an integral part of" Susquehanna's "transportation service for interstate passengers". See *Boynton v. Virginia*, 364 U. S. 454, 462-464 (1960).

POINT FOUR.

The legislative history of §13a does not support the construction advanced by Appellants.

Appellants have predicated their entire argument on what must be conceded to be a narrow and strict reading of the statute, looking only to the words and ignoring underlying purposes and objectives. The position is one rarely found convincing in the construction of statutes, for, as was said by the Chief Justice in *United States v. Louisville, etc. Co.*, 235 U. S. 314, 326 (1914), in connection with another amendment to the Interstate Commerce Act:

"Indeed when the evil which it may be assumed conduced to the adoption of the amendment of §4 and the remedy which that amendment was intended to make effective are taken into view . . . it would seem that the case before us cogently demonstrates the applicability of the amendment to the situation. And it needs no argument to demonstrate that the application of *the principle of public policy which the statute embodies is to be determined by the substance of things and not by names*, for if that were not the case the provisions of the statute would be wholly inefficacious, as names would readily be devised to accomplish such a purpose." (Emphasis added):

The legislative history, of course, is quite clear in its disclosure of the evil to be remedied and the purpose intended to be achieved by the enactment of section 13a.

As was stated in House Report No. 1922 (U. S. Code Congressional and Administrative News, 85th Congress, 2d. Session—1958, p. 3456) :

“The purpose of this bill is to amend the Interstate Commerce Act in order to strengthen and improve our Nation's common carrier surface transportation system so that it may better fulfill its role in meeting the transportation needs of the Nation's expanding economy and the requirements of national defense.”

Further, at p. 3467, discussing the proposed section 13a, the report said:

“A major cause of the worsening railroad situation is the unsatisfactory passenger situation. Not only is the passenger end of the business not making money—it is losing a substantial portion of that produced by freight operations.”

The background is outlined at p. 3468:

“Under the act, the Interstate Commerce Commission has jurisdiction over the complete abandonment of a line of track. The discontinuance or change of schedules of trains, (without complete abandoning of the line of track over which they operate) however, is subject to the jurisdiction of the interested States. Such local regulation of what has come to be a national problem has hampered the railroads from making some changes in their passenger train operations in line with changes in patronage, and has contributed greatly to the passenger deficit. Witnesses have not suggested that all State commissions have taken obstructive attitudes, but only that it has proved impossible to secure necessary relief in some States.”

Then follows a description of the House version of proposed §13a as reported by the committee, which allowed

railroads to discontinue passenger operation or service under I. C. C. supervision so long as the line of railroad on which it took place was not located wholly within a single State, but not covering operations more local in character, such as those of a branch line or other line of railroad located solely within one State; it also noted that the committee's bill had deleted like coverage as to stations, depots or other facilities.

After conference committee study, the version enacted was reported out, and the Conference Report (*Idem*, at p. 3486-3487) explains the section in some detail, but really says nothing more than the section itself, and sheds no light on the subject here involved.

The same may be said of the floor discussions on which Appellants place such heavy reliance. "All the legislative talk only reiterates what the statute itself says" *Callanan v. United States*, 364 U. S. 587, 593 (1961).

The excerpts of the floor debate set out in the Transcript (R. 96 to R. 100) were claimed below to support the divergent positions taken on this appeal, and we suppose the most accurate statement that can be made about the excerpts is that some talk about the House bill as it stood before amendment by the committee, some talk about the Senate bill and a proposed amendment to it before the Conference Report was made, none of it talks about the Conference Committee version which was enacted (the Conference Report was on July 24, 1958 and the last floor discussion quoted was on June 27, 1958), and none of it discusses explicitly the type of interstate operation involved here.

Thus, the colloquies in the House by Mr. Harris (R. 99-100) put local trains under local supervision only if the line of railroad on which they operated were entirely

within one State. This correctly describes the House Committee version, as outlined in its report of June 18, 1958, but not the one passed.

And the colloquies in the Senate by Senator Smathers (R. 96-99) are all on June 11, 1958, relate to the Senate bill (which was not passed) and an amendment proposed to meet an objection by Senator Russell, and shows in its text that it is discussion about a different version than was passed.

Thus, in explaining the amendment then under discussion, Senator Smathers said that where a train had "its origin and destination in the same State", that train and its facilities—"specifically the terminals"—would be "completely under the jurisdiction of the State regulatory body." (R. 96-97).

Aside from the fact that the trains now before the court would not come within the category described by Senator Smathers (because their destination is New York and their terminal is New York), the fact is that §13a(2) does not put the described category "completely under the jurisdiction of the State regulatory body." On the contrary, in the case of such trains, if the State body refuses to permit the discontinuance or fails to act after 120 days, the I. C. C. may enter an order permitting it.

These points were brought out in the trial court, and the dissenting opinion suggests that a view contrary to that of Appellants would amount to a concealment of intention within the Senator's "frank commitment" (R. 24). No such element is involved, of course, because the Senator's description relates to a proposed amendment to another bill, and not to §13a as enacted.

To the extent that the floor discussion approaches the kind of operation here involved, the only pertinent state-

ment is that of Senator Smathers (R. 97-98), where he draws the line which the compromise would have set in these words:

"We give authority to the Interstate Commerce Commission only over interstate commerce trains. We more clearly define that the public utilities commission has authority over *completely intrastate trains and facilities*." (Emphasis added):

At an earlier point he had made explicit that by "facilities" he meant "specifically the terminals" (R. 96). Hence, if his explanations have any utility whatever, it would need to appear that Susquehanna's trains and terminal are "completely intrastate" trains and terminal.

The assertion that they are "completely intrastate" we submit, cannot be successfully made, in light of the determination, binding on the parties, that Susquehanna's terminal is New York (R. 46 to R. 49) and the fact that Susquehanna transports some 90% of its passengers between New Jersey and New York (R. 17, footnote).

In summary, then, it must be said that the floor discussions are of little aid as a guide to solving the present problem; and that the answer lies in the evil sought to be met and the means for accomplishment of that end. While extended review in detail of the floor debate would not be productive, "certain points can be made with confidence." *Maintenance of Way Employees v. United States*, 366 U. S. 169, 174-175. (1961).

The evil was that railroad operations going across State lines were regulated, short of total abandonment, by local agencies whose decisions were either delayed, conflicting or unreasonable; that losses from passenger operations were so severe as to consume a large part of the freight revenues; that the "obstructive attitudes" of and

the impossibility of securing necessary relief in "some States" hampered the railroads and "contributed greatly to the passenger deficit."

The remedy was to provide federal authority for the change or discontinuance of the operation or service of trains and ferries; where the train was interstate, carriers had an option to seek exclusive federal authority by the procedure of §13a(1); where it was intrastate, it had a like option under §13a(2) but only after the local agency had denied relief or failed to act.

The facts and history of this case are another replay of this sad, old, tuneless refrain; the same doleful dirge; the same progression of dischords which composed the theme of the 1958 amendment.

The history outlined in the Statement (R. 31 to 39) tells what went on before. The first hearings went on from 1956 to April of 1957, at which time Senate Concurrent Resolution No. 20 (1957) was passed by the New Jersey legislature. Known as the "Forbes Resolution", it was sponsored by one of the gubernatorial candidates in that year. Though not having the force of law, and though a clear denial of due process, the state agency obeyed it and suspended further proceedings. Susquehanna was obliged to take this inaction up on appeal and secured an order equivalent to a writ of *procedendo* (25 N. J. 343). The agency then allowed some curtailment of service, and Susquehanna's appeal therefrom took another 17 months before additional relief was secured. Altogether, some three and one-half years and two appeals were involved in that first phase.

The current phase is following the same pattern. Nearly a year elapsed in the process of applying for reconsideration and for hearing and decision in the District Court.

another year will doubtless elapse in the prosecution of the present appeal. In all this time the state agency has seen fit to ignore the desperate financial plight of Susquehanna and has managed to compel it to continue an *interstate commutation service* which it lacks the power to order operated.

This, perhaps, may be the litmus test by which a particular operation or service may be identified as coming within §13a(1) or §13a(2): namely, is the operation or service one which, aside from §13a, a State acting within the full scope of its governmental power could order to be operated?

Assuming that, we have no doubt that if the local public necessity and convenience justified it, the New Jersey board has the *power* to order Susquehanna to operate a train between Butler, N. J., and Paterson, N. J., for example; or between Paterson, N. J. and Babbitt, N. J., to serve the needs of *intrastate* passengers travelling between such points. That power could be exercised provided the exercise were reasonable. See *Pennsylvania Railroad Co. v. Public Utility Commissioners*, 11 N. J. 43, 53-55 (1952); and *Erie R. R. Co. v. State*, 51 N. J. Super. 61, 66-67 (App. Div. 1958). That is not this case.

But the New Jersey board does not have the power, no matter how great the need or how reasonable its exercise, to order the operation of a train to Susquehanna Transfer (which is a transfer point and not a station, R. 47) and the transport of the passengers across the Hudson River to and from New York. That is this case.

The *sense* of the distinction between §13a(1) and §13a(2) is that an operation or service which comes within §13a(2) must at least be one which a State otherwise has the power to direct be performed or furnished; the provision grants

nothing to the States which they do not already have. It merely allows them to have the first consideration of something which must otherwise be within their power. If a State cannot, for obvious reasons, order an *interstate* operation or service, then that subject falls under §13a(1) and not §13a(2), and the State has not the power to deny its change or discontinuance.

POINT FIVE.

Appellants' arguments on miscellaneous aspects are incorrect.

a. The construction placed on §13a (1) by the I. C. C. in this case is not a construction that may be read into the statute on this appeal.

Appellants try to lift themselves by their own bootstraps. They argue in their Brief (page 7 and page 16) that the I. C. C. in this case construed the statute in the manner urged by Appellants, and that this administrative interpretation is entitled to weight.

This contention is frivolous. It is settled that the I. C. C., in passing on an application filed with it, may incidentally pass upon the question of the applicability of a statutory paragraph to the subject of the application, but the actual decision thereof is a question for the court.

As was stated in *Powell v. United States*, 300 U. S. 276 (1937):

"The function of the court is to construe that paragraph; that of the commission is to determine whether the project, if it is one covered by the paragraph, is in the public interest."

b. Appellants' emphasis on the use of the words "train" and "ferry", and on the absence of the word "bus", is misplaced.

This argument runs throughout Appellants' brief, and it largely consists of pointing to the inclusion of an interstate "ferry."

The reason for the inclusion of a "ferry" separate and apart from the trains served by it, is so well known as to demonstrate the invalidity of the argument. The problem of obstructionist attitudes of State agencies was not limited to the matter of discontinuing some of the Hudson River ferries, but the ruling in the First Ferry Cases evidently was the straw that broke the camel's back and induced enactment of §13a.

The Erie and the New York Central, as the Ferry Cases show, were interested in discontinuing the ferries themselves, separate and apart from the trains; besides, as we all know, those ferries were not the kind of fully integrated service that Susquehanna's intraterminal bus transfer is. Those ferries served all comers: Passengers walking in off the street, automobiles and trucks, as well as persons riding Erie and Central trains, were carried across the river. Hence, to discontinue the ferries, separate and apart from the trains, it was essential that "ferry" be particularized.

That situation does not obtain here. The intraterminal bus does not run on a schedule independent of the trains, nor does it carry any but rail-passengers. As the record shows,

"No tickets are sold to or from Susquehanna Transfer, and it is not intended that any passenger should either start or terminate their trips at such point, but rather that its use should be limited solely to the transfer of passengers from train to bus or bus to train" (R. 47).

As the Statement filed with the I. C. C. discloses, the operation or service to be discontinued was the *entire* run between Butler, N. J., and New York (R. 29-30; and see Timetable at R. 45). As the timetable shows, "Train 919" starts at the Port Authority Bus Terminal at 4:50 P. M. and arrives at Butler at 6:22 P. M., with motor coach connection at Susquehanna Transfer. And, as the majority opinion notes (R. 16), the published tariff specifies that the "Motor Coach Terminal Service—New York, N. Y.," is "available only to passengers holding tickets reading as described in paragraph 1 below . . . to or from stations on the New York, Susquehanna and Western Railroad Company, Babbitt, N. J. and stations West thereof, on the one hand, and New York, N. Y. via the Susquehanna Transfer, N. J., on the other." (Emphasis added).

If Susquehanna had posted and filed notices seeking discontinuance of the bus service *alone*, separate and apart from the whole run, there might be some color to the argument, but as the operation or service involved is the three trains, which serve New York, and since the bus service is integral and required to be regulated as though it were a train by 49 U. S. C. § 302(c), the contention is without merit.

c. The fact that the enactment of §13a was stimulated by the Hudson River ferry problem provides no basis for not giving the section the full scope of its actual coverage.

This argument is set out in the dissenting opinion (R. 23), and it is pressed in Appellants' Brief (pages 11-12). We find its presentation disturbing because it suggests that general legislation, perhaps brought to a head by some one shocking situation, is to be treated as a private and special law not available to others.

We submit that such history, if true, is to be wholly disregarded as a guide to construction, and that the correct attitude is to apply basic principles in the full scope of their generality.

As was said in a different context:

"What we there said" [*NAACP v. Alabama*, 357 U. S. 449, 462] "was not designed, as I understood it, as a rule for Negroes only. The Constitution favors no racial group, no political or social group."

Dissent, per Mr. Justice Douglas in *Updegraff v. Wyman*, 364 U. S. 388, 406 (1960).

If necessary restaurant services at a bus terminal are to be regarded as an integral part of a transportation service for interstate passengers for the purposes of 49 U. S. C. §3(1) and §316(d), *Boytan v. Virginia*, 364 U. S. 454 (1960), then the same principle which recognizes functional necessity and integral operation must be applied to §13a.

If physical and operating conditions require that the motor truck movement of goods to and from airfields be regarded as "air transportation", *City of Philadelphia v. Civil Aeronautics Board*, 289 F. 2d 770 (C. A. D. C. 1961), then like considerations require that Susquehanna's transport of passengers by motor coach on rail tickets to and from New York be recognized as covered within §13a(1).

If physical and practical necessities compel recognition of lighterage facilities as being "the equivalent of tracks" in the New Jersey-New York area for the purposes of 49 U. S. C. 1(18), *United States v. Elgen*, 98 F. 2d 264, 266-267 (C. A. D. C. 1938), we submit that transfer services executed by motor coach within the New York terminal must also be recognized as the equivalent of a train for the purposes of §13a.

d. This court has attempted no final definition for a "train" for all statutes and for all purposes.

Appellants rely here, as they did in the District Court, on what they claim is a judicial definition of a "train", to wit, "an engine and cars which have been assembled and coupled together for a run or trip along the road", citing *United States v. Erie R. R.*, 237 U. S. 402 (1915). A reading of that case discloses, however, that the quoted phrase was not intended as a "definition" in any sense. The case involved the applicability of certain requirements of the Safety Appliance Act, which depended on whether the activities were merely switching operations or the actual movement of the trains. The factual problem there arose because Erie had three large yards on the west bank of the Hudson, some 2 to 3½ miles apart, between which it moved its freight cars. The question before the court therefore was whether these were merely "switching operations" (in which case the particular requirements of the Act would not apply), or whether they were "train movements" (in which case the requirements would apply). No question of the nature now under consideration was there involved or decided, and the passage relied on by Appellants does not even pretend to be a definition, even for the purposes of that case.

Conclusion.

For the reasons set out in the foregoing brief, Susquehanna submits that the Appellants have failed to carry their burden on this appeal and have shown no error in the ruling appealed from, wherefore it should be affirmed.

And should the Court be of a different view, it is further submitted that the I. C. C. did have jurisdiction under one paragraph or the other of section 13a, and that in that event there should accordingly be, not a reversal, but a modification with directions for further proceedings calculated to achieve a prompt determination of the merits.

Respectfully submitted,

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APPENDIX

**Interstate Commerce Act, Excerpts from § 1;
49 U. S. C. § 1.**

SEC. 1. (1) That the provisions of this part shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or

(b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water; or

—from one State or Territory, of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation takes place within the United States.

(2) The provisions of this part shall also apply to such transportation of passengers and property, but only in so far as such transportation takes place within the United States, but shall not apply—

(a) To the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State and not shipped to or from a foreign country from or to any place in the United States as aforesaid, except as otherwise provided in this part;

(b) or

(c) To the transportation of passengers or property by a carrier by water where such transportation would not be subject to the provisions of this part except for the fact that such carrier absorbs, out of its port-to-port water rates or out of its proportional through rates, any switching, terminal, lighterage, car rental, truckage, handling, or other charges by a rail carrier for services within the switching, drayage, lighterage, or corporate limits of a port terminal or district.

(3) (a) The term "common carrier" as used in this part shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this part it shall be held to mean "common carrier." The term "railroad" as used in this part shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term "person" as used in this part includes an individual, firm, copartnership, corporation, company, association, or joint-stock association; and

includes a trustee, receiver, assignee, or personal representative thereof.

(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this part shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 shall be considered to prohibit the making of contracts between carriers by railroad subject to this part, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks.

Interstate Commerce Act, § 13a; 49 U. S. C. § 13a.

SEC. 13a. (1) A carrier or carriers subject to this part, if their rights with respect to the discontinued or change, in whole or in part, of the operation or service of any train or ferry operating from a point in one State to a point in any other State or in the District of Columbia, or from a point in the District of Columbia to a point in any State, are subject to any provision of the constitution or statutes of any State or any regulation or order of (or are the sub-

ject of any proceeding pending before) any court or an administrative or regulatory agency of any State, may; but shall not be required to, file with the Commission, and upon such filing shall mail to the Governor of each State in which such train or ferry is operated, and post in every station, depot or other facility served thereby, notice at least thirty days in advance of any such proposed discontinuance or change. The carrier or carriers filing such notice may discontinue or change any such operation or service pursuant to such notice except as otherwise ordered by the Commission pursuant to this paragraph, the laws or constitution of any State, or the decision or order of, or the pendency of any proceeding before, any court or State authority to the contrary notwithstanding. Upon the filing of such notice the Commission shall have authority during said thirty days' notice period, either upon complaint or upon its own initiative without complaint, to enter upon an investigation of the proposed discontinuance or change. Upon the institution of such investigation, the Commission, by order served upon the carrier or carriers affected thereby at least ten days prior to the day on which such discontinuance or change would otherwise become effective, may require such train or ferry to be continued in operation or service, in whole or in part, pending hearing and decision in such investigation, but not for a longer period than four months beyond the date when such discontinuance or change would otherwise have become effective. If, after hearing in such investigation, whether concluded before or after such discontinuance or change has become effective, the Commission finds that the operation or service of such train or ferry is required by public convenience and necessity and will not unduly burden interstate or foreign commerce, the Commission may by order require the continuance or restoration of operation or service of such train or ferry, in whole or in part, for a period not to exceed one year from the date of such order. The provisions of this paragraph shall not supersede the laws of any State or the orders or regulations of any administrative or regulatory body of any State applicable to such discontinuance or change unless notice

as in this paragraph provided is filed with the Commission. On the expiration of an order by the Commission after such investigation requiring the continuance or restoration of operation or service, the jurisdiction of any State as to such discontinuance or change shall no longer be superseded unless the procedure provided by this paragraph shall again be invoked by the carrier or carriers.

(2) Where the discontinuance or change, in whole or in part, by a carrier or carriers subject to this part, of the operation or service of any train or ferry operated wholly within the boundaries of a single State is prohibited by the constitution or statutes of any State or where the State authority having jurisdiction thereof shall have denied an application or petition duly filed with it by said carrier or carriers for authority to discontinue or change, in whole or in part, the operation or service of any such train or ferry or shall not have acted finally on such an application or petition within one hundred and twenty days from the presentation thereof, such carrier or carriers may petition the Commission for authority to effect such discontinuance or change. The Commission may grant such authority only after full hearing and upon findings by it that (a) the present or future public convenience and necessity permit of such discontinuance or change, in whole or in part, of the operation or service of such train or ferry, and (b) the continued operation or service of such train or ferry without discontinuance or change, in whole or in part, will constitute an unjust and undue burden upon the interstate operations of such carrier or carriers or upon interstate commerce. When any petition shall be filed with the Commission under the provisions of this paragraph the Commission shall notify the Governor of the State in which such train or ferry is operated at least thirty days in advance of the hearing provided for in this paragraph, and such hearing shall be held by the Commission in the State in which such train or ferry is operated; and the Commission is authorized to avail itself of the cooperation, services, records and facilities of the authorities in such State in the performance of its functions under this paragraph.

Interstate Commerce Act, § 202; 49 U. S. C. § 302.

SEC. 202. (a) The provisions of this part apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation, and the regulation of such transportation, and of the procurement thereof, and the provision of facilities therefor, is hereby vested in the Interstate Commerce Commission.

(b) Nothing in this part shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof.

(c) Notwithstanding any provision of this section or of section 203, the provisions of this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation and equipment, shall not apply—

(1) to transportation by motor vehicle by a carrier by railroad subject to part I, or by a water carrier subject to part III, or by a freight forwarder subject to part IV, incidental to transportation or service subject to such parts, in the performance within terminal areas of transfer, collection, or delivery services; but such transportation shall be considered to be and shall be regulated as transportation subject to part I when performed by such carrier by railroad, as transportation subject to part III when performed by such water carrier, and as transportation or service subject to part IV when performed by such freight forwarder;

(2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to part I, an express company subject to part I, a motor carrier subject to this part, a water carrier subject to part III, or a freight for-

warder subject to part IV, in the performance within terminal areas of transfer, collection, or delivery service; but such transportation shall be considered to be performed by such carrier, express company, or freight forwarder as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water, or the freight forwarder transportation or service, to which such services are incidental.

Excerpts from Rules of Interstate Commerce Commission, 49 Code of Federal Regulations.

§1.2 *Liberal construction.* The rules in this part shall be liberally construed to secure just, speedy and inexpensive determination of the issues presented.

§1.4 *Communications and pleadings generally—*

“(c) *Disposition of; when defective.* In any proceeding when upon inspection the Commission is of the opinion that a pleading, document, or paper tendered for filing does not comply with this part or, if it be an application, does not sufficiently set forth required material or is otherwise insufficient, the Commission may decline to accept the pleading, document, or paper for filing and may return it unfiled, or the Commission may accept it for filing and advise the person tendering it of the deficiency and require that the deficiency be corrected.

§1.5 *Definitions.* As used in this part:

(d) The term “pleading” means a complaint, answer, reply, application, protest, motion (other than motion orally made at hearing or argument), petition, document supplementing oral hearing as described in §1.86 and all documents filed under modified and shortened procedure.

§1.19 *Pleadings part of record.* Recitals of material and relevant facts in a pleading filed prior to oral hearing in any proceeding, unless specifically denied in a counter-pleading filed under these rules, shall constitute evidence and be a part of the record without special admission or incorporation therein, but if request is seasonably made, a competent witness must be made available for cross examination on the evidence so included in the record. Pleadings may contain specific references to or quotation from the tariffs or schedules containing the several rates, fares, charges, schedules, classifications, regulations or practices alleged to be material.

§1.20 *Amendments.* Leave to file amendments to any pleading will be allowed or denied as a matter of discretion.

§1.23 *Replies—(a) Time for filing.* Except that a reply to a reply is not permitted, and except as otherwise provided in paragraph (b) of this section and respecting answers (§1.35 (c)); modified and shortened procedure (§§1.44 (c) and 1.51), and briefs (§§1.92 and 1.93), an adverse party may file and serve a reply to any pleading permitted under the rules in this part within 20 days after filing at the Commission.

§1.27 *Formal complaints; joinder—(a) Causes of action.* Two or more grounds of complaint concerning the same principle, subject, or state of facts may be included in one complaint, but should separately be stated and numbered.

§43.1 *Scope of rules in this part.* The rules in this part govern the procedure to be followed by carriers subject to part I of the Interstate Commerce Act which, under and pursuant to the provisions of section 13a of said act, file

with the Commission a notice under paragraph (1) of said section or a petition under paragraph (2) thereof with respect to a proposed discontinuance or change, in whole or in part, of the operation or service of any train or ferry.

§43.2 *Definitions.* As used in this part:

(a) The term "act" means the Interstate Commerce Act, as amended.

(b) The term "notice" means a notice as provided for in paragraph (1) of section 13a.

(c) The term "petition" means a petition filed with the Commission under the provisions of paragraph (2) of section 13a for authority to effect a discontinuance or change.

§43.3 *Form and style of notice.*

The notice shall be reproduced by printing, multigraphing, or mimeographing (or by any other process provided the copies are clearly legible) on paper not less than 8½ by 11 inches, with the words, "Notice of proposed change (or discontinuance, if appropriate) of service," printed in large bold-face type near the top. If printed, nothing less than 12-point type shall be used in the remainder of the notice.

§43.4 *Contents of notice.*

A separate notice shall be given for each discontinuance or change of service. A single notice may include more than one train or ferry except that unrelated trains or ferries shall not be made the subject of a single notice. Each notice shall set forth the following information:

(a) Exact corporate name and general office address of the carrier.

(b) The number and name or other description of the train or ferry with respect to which a discontinuance or change of operation or service is proposed, the name of each station, depot, or facility affected thereby, and the termini between which the train or ferry operates.

(c) The date on which the discontinuance or change of operation or service is proposed to become effective.

(d) Advice to the public that persons desiring to object to the proposed discontinuance or change should notify the Interstate Commerce Commission, at Washington, D. C., of such objection and the reasons therefor at least 15 days before the effective date of the proposed discontinuance or change.

§43.5 *Information required with notice.* With each notice of a proposed discontinuance or change of operation or service, there shall be filed with the Commission a "Statement in Relation to Proposed Discontinuance or Change of Train or Ferry Service" which, in the body thereof or in exhibits attached thereto and referred to therein, shall contain the following:

(a) Exact corporate name and general office address of the carrier proposing the discontinuance or change.

(b) Name, title, and post office address of counsel or officer to whom correspondence in regard to the notice should be addressed.

(c) Complete description of the present service of the train or ferry involved and of the discontinuance or change of operation or service proposed.

(d) Complete statement of the reasons for the proposed discontinuance or change of operation or service.

(e) The names of all railroads interchanging passengers or freight with the subject train or ferry, and the points of such interchange.

(f) Description of other common carrier service, including service of the subject carrier, of the same kind (passenger or freight) rendered by the trains or ferries involved, between and at the points described in the notice and other common carrier service available in the immediate territory.

(g) A statement of the traffic transported on trains or ferries involved for each of the last 2 calendar years and for the part of the current year for which such information is available. If information for such periods is not submitted, explanation must be given as to why such information was not submitted. When a notice involves more than one train or ferry, the traffic of each should be segregated to the extent practicable. If the proposed discontinuance or change involves less than all of the stations served by a train or ferry, to the extent such information is available segregation should be made of the traffic transported to and from each station which will be affected.

(h) Financial results of operating the trains or ferries involved during the period or periods embraced in the statement submitted pursuant to paragraph (g) of this section, segregated in the same manner and to the same extent as required by that paragraph.

(i) A copy of the carrier's general balance sheet statement as of the latest date available; and of its income statements for each of the last two calendar years and for that portion of the current year for which such information is available.

(j) A certificate that a copy of the notice and of the "Statement in Relation to Proposed Discontinuance or Change of Train or Ferry Service" has been mailed to the Governor and railroad regulatory body of each State in which the subject train or ferry is operated and that such notice has been posted in a conspicuous place in each station, depot, or other facility involved, including each ferry and each passenger car on trains affected; which certificate shall include information of the date or dates on which the notice and statement were mailed and the date or dates on which the notice was posted as aforesaid and that a copy of the notice and statement were served upon the Assistant Postmaster General, Bureau of Transportation, Washington 25, D. C., and the Railway Labor Executives' Association, Washington 1, D. C.

(k) Map showing the geographic situation of the line over which the train operates, or, if a ferry, the route traversed. The map should show the line or route clearly, by color or otherwise, and the stations thereon, on a sheet not smaller than $8\frac{1}{2} \times 11$ inches. Three copies of the map should be submitted unbound for use of the Commission, in addition to those attached to the statement.

§43.6 *Petition.* Petitions for authority to effect a discontinuance or change of the operation or service of a train or ferry shall contain in the body thereof or in exhibits attached thereto and referred to therein, the information required by paragraph (b) of §43.4, that required by §43.5 excepting paragraph (i) thereof, and in addition the following:

(a) The date on which the petition or application for discontinuance or change in the operation or service of the train or ferry was filed with the appropriate State authority.

(b) Identification of the State authority with which such petition or application was filed.

(c) Description of the action, if any, taken by such State authority on the petition or application filed with it.

(d) To be filed only with the original of the petition to the Commission, copy of the record made before the State authority, including copies of the application or petition to it, transcript of any oral hearing, and decision and order, if any.

§43.7 *Execution.* The original copy of the statement required by §43.5 and of a petition as described in §43.6 shall be signed in ink by an executive officer of the carrier having knowledge of the matters and things therein set forth. Persons signing the statement or petition shall also sign a certificate in form as follows:

..... hereby certifies that he is the
 (Name)
 of the
 (Title)
 petitioner

(Corporate name of petitioner)
 herein; that he has been authorized by proper corporate action on the part of said petitioner, or by the proper court, to execute and file with the Interstate Commerce Commission the foregoing statement (or petition); that he has carefully examined all of the statements referred to in said statement (or petition) and the exhibits attached thereto and made a part thereof; that he has knowledge of the matters set forth therein; and that all such statements made and matters set forth therein are true and correct to the best of his knowledge, information, and belief.

.....
 (Signature)

Dated this day of 19.....

NOTE: A false statement is punishable by law.

43.8 Filing: copies.

As applicable, 8 copies of the notice and an original and 7 copies of the accompanying statement, or an original and 7 copies of the petition shall be filed with the Secretary of the Commission, Washington, D. C. Each copy of the statement or petition shall bear the dates and signatures that appear in the original and shall be complete in itself; but the signatures in the copies may be stamped or typed.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1962.

No. 104.

STATE OF NEW JERSEY AND BOARD OF PUBLIC
UTILITY COMMISSIONERS OF THE STATE OF
NEW JERSEY,

Appellants,

vs.

NEW YORK, SUSQUEHANNA AND WESTERN
RAILROAD COMPANY,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY.

APPELLANTS' REPLY BRIEF.

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APPELLANTS' REPLY BRIEF.

Since jurisdiction is necessarily interrelated with procedure, Appellee's distinction between the two is invalid.

This reply will be limited to Point I in Appellee's brief containing a subject raised for the first time on this appeal.

Appellee says, "The issue presented by this appeal does not really involve a question of jurisdiction of the I. C. C., but merely a question of procedure."

This is idle semantics, since it attempts an invalid distinction between procedure and jurisdiction.

The obvious fact is that jurisdiction nearly always depends upon procedure, the most basic example being the proper service of correct process on a defendant at the institution of an action; it would surely be as idle, as it is in the present instance, for the Appellee in such case to say, "this concerns not jurisdiction but mere procedure, since only the mechanics of service are in question."

Another example, among legions which will come to mind, might be the institution of an action in the federal court which should be brought in a state court, the faulty "procedure" consisting in the filing of the action in a court which lacks jurisdiction. Surely in that case the party could not be heard to say that this is a procedural distinction.

In this proceeding the Appellee sought to invoke the jurisdiction of the Interstate Commerce Commission, ignoring the jurisdiction of the State. The Appellee succeeded in persuading the Court below that its action was proper and we now have on the books what the State considers an erosion of its jurisdiction over discontinuance of the operation or service of a train operating wholly within the boundaries of a single state.

Appellee's argument that Appellants make a mere procedural distinction rests on Appellee's assumption that it has already established its right to relief under either Section 13a(1) or 13a(2). However, there is a fundamental difference between Sections 13a(1) and 13a(2) in that under the latter section, where intrastate trains are involved and primary State jurisdiction is therefore recognized, a full hearing on the merits, unlike the "procedure"

set forth in Section 13a(1), must be held before decision is made to continue or discontinue the trains. The fallacy of Appellee's argument is clearly demonstrated by the fact that, to this date, there has never been any such hearing.

Conclusion.

Appellants respectfully submit that the new issue raised by Appellee in Point I of its brief is without merit, and for the reasons heretofore stated in Appellants' briefs, the judgment of the Court below should be reversed.

Respectfully submitted,

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Dated: December 6, 1962.